In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1622

BATON ROUGE MARINE CONTRACTORS, INC.,
Petitioner

versus

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents

CARGILL, INC., Intervenor
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Now comes Baton Rouge Marine Contractors, Inc. and respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case, Docket No. 75-1108 (consolidated with Docket No. 75-1018), on February 12, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the

District of Columbia Circuit is unreported;[1] the report and order of the Federal Maritime Commission is not officially reported; an unofficial report containing the decision is cited as 14 Shipping Regulation Reports 1373.[2]

QUESTIONS PRESENTED

The question presented here is whether the Federal Maritime Commission, in construing an agreement exempting conduct of the parties to that agreement from the strictures of the antitrust laws [under the license granted to such agreements by Section 15 of the Shipping Act, 1916, 46 USCA 814], can interpret that agreement in a broad and expansive manner thereby giving to the statute, Section 15, a narrow and restrictive interpretation, under the decisions of this Court and of the lower federal courts heretofore speaking on this subject.

The interpretation of the agreement in suit by the Federal Maritime Commission, approved by the Court of Appeals below, permitted a change in incidence as to certain charges assessed, under the cloak of the agreement, against third parties and, as such, creates a direct conflict with the decision of the Court of Appeals for the First Circuit in *Port of Boston Marine Terminal Association v. Boston Shipping Association*, 420 F.2d 419 (1970), reversed on other grounds, 400 US 62, 27 L. Ed. 2d 203 91, S. Ct. 203. The decision below, further, is in conflict, as pointed out by the Court of Appeals for the First Circuit in the *Port of Boston Marine Terminal Association* case, *supra*, with the decision of this Court in *Volkswagenwerk A.G. v. FMC*, 390 US 261, 19 L.Ed. 2d

1. Appendix A, *infra*.
2. Appendix B, *infra*.

1090, 88 S. Ct. 929 (1968) and also cannot be reconciled with the subsequent decision of this Court in *FMC v. Seatrain Lines*, 411 US 726, 36 L. Ed. 2d 620, 93 S. Ct. 1773 (1973).

STATUTES INVOLVED

The statute which governs the issues presented here is Section 15 of the Shipping Act, 1916, 46 USCA 814, enabling parties regulated by the Shipping Act to obtain exemption from the antitrust laws for agreements submitted to and approved by the Federal Maritime Commission. The statute is appended as Appendix C, *infra*.

STATEMENT OF THE CASE

Petitioner, Baton Rouge Marine Contractors, Inc. (hereinafter referred to as "BARMA") is a contracting stevedore hired to load vessels at the public grain elevator erected, at Baton Rouge, Louisiana, by the Greater Baton Rouge Port Commission (hereinafter referred to as "Port Commission").

The grain elevator was completed and leased by the Port Commission to Cargill, Inc. (hereinafter referred to as "Cargill") in 1955 but the lease agreement was not submitted at that time for approval by the predecessor agency of the Federal Maritime Commission, i.e., the Federal Maritime Board (the two agencies will be referred to hereinafter, for convenience, simply as "FMC"). One year later Cargill and the Port Commission executed an amendment to the lease which gave Cargill the right to appoint a subsidiary company as the exclusive stevedore at the grain elevator and the only such company entitled to participate in the loading of grain aboard vessels calling at the elevator. The lease with its exclusive stevedoring amendment became the subject of a

complaint filed by BARMA before the FMC. Hearings were held and the FMC determined that the lease required its approval under Section 15 of the Shipping Act, 1916, 46 USCA 814; the lease was approved but the exclusive stevedoring amendment was disapproved under Section 15 as well as under Section 17 of the Shipping Act, 1916, 46 USCA 816, *Agreements Nos. 8225 and 8225-1,* 5 FMB 648 (1959). The Court of Appeals for the Fifth Circuit affirmed, *Greater Baton Rouge Port Commission v. United States,* 287 F.2d 86 (CA, 5, 1961), reh'g den. 293 F.2d 959, cert. den., 368 US 985 (1962). Cargill under the lease exercises a monopoly on the operation of grain elevators at Baton Rouge.[3]

From the time of the execution of the original lease in 1955 through the execution of the amendment, the proceedings before the regulatory agency and before the Fifth Circuit, all culminating with the decision of the latter in 1961, no grain elevator in the United States Gulf, the area with which we are concerned here, imposed any form of charge against stevedores operating at the elevator. The first time a charge was so imposed against stevedores in the United States Gulf was when one was instituted by Cargill at an elevator owned and operated by it in the port of Houston, Texas. This occurred in 1967, twelve years after the execution of the lease of the Baton Rouge elevator, eleven years after the attempted amendment of that lease by which Cargill sought to regulate stevedoring at the elevator and six years following the decision, in 1961,of the Court of Appeals for the Fifth Circuit by which the litigation resulting in the disapproval of the lease amendment was terminated. Another

3. *Greater Baton Rouge Port Commission v. U.S.,* 287 F.2d 86 (CA, 5, 1961), reh. den. 293 F.2d 959, cert. den. 368 US 985, 7 L.Ed. 2d 523, 82 S. Ct. 600; *Greater Baton Rouge Port Commission v. Cargill, Inc.,* 252 La. 718, 214 So.2d 119 (1968).

four years elapsed before Cargill, in 1971, first imposed charges against stevedores operating at the Baton Rouge grain elevator, which charges are the subject of this litigation.

On the institution of the charges by Cargill and its advices that it would not load any ships served by BARMA, unless BARMA agreed to the payment of those charges, a complaint was filed by BARMA before the FMC giving rise to the proceedings which have progressed to the point of this petition.

ARGUMENT

The holding below, toward which this petition is directed, may be briefly stated in the language of the Court of Appeals. As said by the Court, the underlying agency, the Federal Maritime Commission, held "that the lease to Cargill gave it a broad authority which embraces such a practice (i.e., imposing a charge against stevedores seeking to serve the vessels employing them) even though it was not specifically foreseen"[4] and even though the charge was "unprecedented at Baton Rouge".[5]

The important elements here are all outlined by this language of the Court of Appeals. These are:

1. The lease did not in any terms give Cargill authority to impose charges against stevedores. As pointed out by the Court (and by the Commission) this "was not specifically foreseen"; indeed such charges were "unprecedented" when the lease was executed between the parties and approved by the FMC.

4. Decision of Court of Appeals, Appendix A, p. A-9.

5. Ibid, p. A-7.

2. Under the lease, a Section 15 agreement, it is not necessary that the grant of authority be specified but, on the contrary, under the broad and general language, the parties may create new and totally "unprecedented" charges against third parties never before subject to any charges.

We submit that the courts must choose between two possible interpretations of Section 15, i.e., either (a) a broad interpretation of the statute under which exemptions from the antitrust laws granted by approval of agreements thereunder are obtained only when the specific terms of the exemptions are set forth in the agreements and, following approval, such exemptions are narrowly construed, or, (b) an interpretation under which the statute itself will be narrowly construed and the agreements subject to it will be given a substantial breadth of interpretation according antitrust exemptions beyond their specific terms which exemptions were "not specifically foreseen" and were "unprecedented" at the time of approval.

The decisions of this Court and of the lower federal courts prior to this case have dictated, emphatically and repeatedly, that Section 15 must be broadly construed and the agreements approved pursuant to its terms given a narrow interpretation, thus limiting the scope of the antitrust exemptions gained thereby. In its most recent decision on the statute, this Court held:[6]

"* * * A broad reading of the third category would conflict with our frequently expressed

6. *FMC v. Seatrain Lines,* 411 US 726, 36 L.Ed. 2d 620, 93 S.Ct. 1773 (1973).

view that *exemptions from antitrust laws are strictly construed.* see, e.g., United States v. McKesson & Robbins, Inc., 351 US 305, 316, 100 L.Ed. 1209, 76 S.Ct. 937 (1956), and that *'[r]epeals of antitrust laws by implication from a regulatory statute are strongly disfavored.* and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions'. United States v. Philadelphia National Bank, 374 US 321, 350-351, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963) (footnote omitted). As we observed only recently, '[w]hen...relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws'. Otter Tail Power Co. v. United States, 410 US 366, 374, 35 L. Ed. 2d 359, 93 S.Ct. 1022 (1973). See also Silver v. New York Stock Exchange, 373 US 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963); Pan American World Airways, Inc. v. United States, 371 US 296, 9 L. Ed. 2d 325, 83 S. Ct. 476 (1963); California v. Federal Power Commission, 369 US 482, 8 L. Ed. 2d 54, 82 S. Ct. 901 (1962); United States v. Borden Co., 308 US 188, 84 L. Ed. 181, 60 S. Ct. 182 (1939). *This principle has led us to construe the Shipping Act as conferring only a 'limited antitrust exemption' in the light of the fact that 'antitrust laws represent a fundamental national economic policy'.* Carnation Co. v. Pacific Westbound Conference, 383 US 213, 218, 219, 15 L. Ed. 2d 709 (1966)."

(footnote omitted and emphasis added)

Similarly, this Court held that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest', unless other evidence in the record fairly detracts from the weight of this factor."[7] Plainly no evidence was or could have been adduced or considered by the FMC to outweigh an undisclosed factor which by the decision of the FMC was created by the use of "broad, expansive language" which granted "plenary rate authority" subject to "no conditions, restrictions or qualifications."[8]

The FMC, by construing this lease in such "broad, expansive language", thereby took what was characterized by this Court in *Volkswagenwerk A. G. v. FMC,*[9] as "an extremely narrow view of a statute that uses expansive language" under which "in deciding whether to approve an agreement, the Commission is required under Section 15 to consider antitrust implications". Certainly no such implications were or could have been considered by the Commission at the time of

7. *FMC v. Aktiebolaget Svenska Amerika Linien,* 390 US 238, 19 L. Ed. 2d 1071, 88 S. Ct. 1005 (1968). See also *Carnation Co. v. Pacific Westbound Conference,* 383 US 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966) which noted that the purpose of the Congress would not "be frustrated by the application of the antitrust laws to the implementation of Conference agreements which had been subjected to public scrutiny and examination by a governmental agency". It certainly would be frustrated here where the public, in its scrutiny, as well as the governmental agency, would not have been apprised as to the scope of the exemption until, more than a decade later, the "broad, expansive language" was expanded by Cargill to encompass matters in no manner contemplated (or "specifically foreseen") by anyone [and, indeed, not even in existence] at the time of the approval.

8. Report of Federal Maritime Commission, Appendix B, infra, pp. B-32-34.

9. 390 US 261, 19 L. Ed. 1090, 88 S. Ct. 929 (1968).

its approval of this agreement since the scope of the agreement and its antitrust implications (and exemptions) were not set forth in the terms of the agreement.

A case which was for all purposes identical was considered by the Court of Appeals for the First Circuit in *Port of Boston Marine Terminal Association v. Boston Shipping Association,*[10] where the court held:

> "* * * Section 15 requires that 'modifications as well as the original agreement, receive the prior approval of the Commission'. In Boston Shipping the Commission,without any discussion of the broad language of the act held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring Section 15 filing and approval.
>
> "In the light of the strictures expressed in VW, supra, n. 1., *this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in VW pointed to the 'expansive language' of Section 15 and the Commission's 'extremely narrow view', and specifically rejected the binding effect of the Commission's administrative construction.* 390 US 261, 272-73. Then referring to the statute's 'literal provisions' the Court spoke of possible exceptions only in terms of a 'de minimis or routine character', and stated that even these must be defined by 'appropriate administrative proceedings'. 390 U.S. 261, 276.

10. 420 F. 2d 419 (1970), reversed on other grounds, 400 US 63, 27 L. Ed. 2d 203, 91 S. Ct. 203.

"Even this exception could not apply in the case at bar. No administrative proceedings had been held to establish guidelines under which modifications might be found 'de minimis or routine'. Administrative standards cannot be established ex post facto. Cf. NLRB v Wyman-Gordon Co., 1969, 394 U.S. 759; 5 USC § 553.

"We may add, for good measure, that a change in incidence, as distinguished from a change in rate, seems to us anything but routine. Even less routine is an unjustifiable change. The Commission expressly found this one 'unjust and unreasonable' to the extent that demurrage was to be charged to the vessel even if the strike did not commence until after the expiration of free time, when the vessel's obligation to make the goods available had been fully performed. 10 FMC at 417-18. It would peculiarly violate Section 15's 'expansive language' to hold that an unreasonable modification could be rewritten nunc pro tunc and saved in part."

(footnotes omitted and emphasis added)

Just such a "change of incidence" was involved here; any cost elements involved in the charge were shifted from Cargill to the stevedores serving vessels at the elevator.

This decision of the Court of Appeals for the District of Columbia Circuit is in direct conflict with the prior decisions of this Court and with the holding of the Court of Appeals for the First Circuit in the *Boston Marine Terminal Association case*.

CONCLUSION

The Court of Appeals and the FMC in this case have departed from the established standards of construction of Section 15 and of agreements approved by the agency thereunder in a manner which cannot be reconciled with the decisions of this Court or the lower federal courts. The decision is one which will only serve to create confusion in the interpretation of agreements falling under that statute-which cannot be permitted. The importance of the question presented is further emphasized by the fact that Section 15 accords immunity from the antitrust laws which "represent a fundamental national economic policy".[11]

We submit, for the foregoing reasons, that a writ of certiorari should be granted herein and that the decision of the court below should be reversed by this Court, to avoid direct conflict between the circuits and with the decisions of this Court in this important area of Federal law.

Respectfully submitted,

Benjamin W. Yancey

Edward S. Bagley

TERRIBERRY, CARROLL,
YANCEY & FARRELL

Of Counsel

11. *Carnation Co. v. Pacific Westbound Conference,* 383 US 213, 15 L. Ed. 2d 709, 86 S. Ct. 781 (1966).

CERTIFICATE OF SERVICE

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing petition to respondents' counsel of record, Thomas E. Kauper, Assistant Attorney General, and Howard E. Shapiro and Robert J. Wiggers, Attorneys, Department of Justice and on Richard E. Hull, General Counsel, Edward G. Gruis, Deputy General Counsel and Gordon M. Shaw, Attorney, Federal Maritime Commission, and to counsel of record for intervenor below, Cargill, Incorporated, Edward Schmeltzer, E. J. Sheppard and Cecilia E. Wirtz, by mailing copies thereof, postage prepaid, to them at their offices, Washington, D. C., on this 5th day of May, 1976.

Benjamin W. Yancey

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1018

CARGILL, INC., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS
BATON ROUGE MARINE CONTRACTORS, INC., INTERVENOR

No. 75-1108

BATON ROUGE MARINE CONTRACTORS, INC., PETITIONER

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENT
CARGILL, INC., INTERVENOR

Petitions for Review of an Order of the
Federal Maritime Commission

Argued November 4, 1975

Decided February 12, 1976

Edward J. Sheppard, with whom *Edward Schmeltzer* and *Cecelia E. Wirtz*, were on the brief for petitioner in No. 75-1018 and intervenor in No. 75-1108.

Edward S. Bagley, for petitioner in No. 75-1108 and intervenor in 75-1018.

Gordon M. Shaw, Attorney, Federal Maritime Commission, with whom *James L. Pimper*, General Counsel and *Edward G. Gruis*, Deputy General Counsel, Federal Maritime Commission, were on the brief for respondent Federal Maritime Commission.

Robert J. Wiggers, Attorney, Department of Justice, with whom *Howard E. Shapiro*, Attorney, Department of Justice, was on the brief for respondent, United States of America. *Carl D. Lawson*, Attorney, Department of Justice, also entered an appearance for respondent, United States of America.

Before: LEVENTHAL, *Circuit Judge*, LUMBARD,* *Senior Circuit Judge* for the Second Circuit and WILKEY, *Circuit Judge*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: This appeal involves two petitions for review, under 28 U.S.C. § 2342,[1] of the report and order of the Federal Maritime Commission in Docket No. 71-29, issued January 7, 1975, which held that the terminal operator for the Port of Baton Rouge could institute charges against stevedores for the use of terminal facilities and services but that its 8-cents per ton service and facility charge was unlawful under § 17 of the Shipping Act (Act), 46 U.S.C. § 816,[2] to the extent it was not reasonably related to the benefits accruing to stevedores. The Commission remanded the proceeding to the Administrative Law Judge (ALJ) for a determination of what would constitute a "proper allocation of services and facilities benefits to stevedores . . . in order to arrive at a charge that can be properly assessed against the stevedores" (J.A. 75). Commissioners Barrett and Morse dissented on the ground that Cargill's allocation to the stevedores was sufficiently related to benefits to pass muster under § 17.

In No. 75-1018, Cargill, Inc., the terminal operator, maintains that its service and facility charge is reasonably related to the benefits provided to stevedores; that the Commission applied a public utility ratemaking standard rather than the less exacting reasonableness standard appropriate under § 17; and that the Commission's order suspending the 8-cents charge pending further hearing before the ALJ is, in effect, an interlocutory injunction beyond its statutory power. In No. 75-1108, Baton Rouge Marine Contractors, Inc. (Barma), a corporation comprised of four stevedores, argues that Cargill's

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

[1] 28 U.S.C. § 2342, as amended in 1966, gives the courts of appeals exclusive jurisdiction over such final orders of the Federal Maritime Commission as are made reviewable under 46 U.S.C. § 830.

[2] 46 U.S.C. § 816 provides in relevant part:

> Every such carrier [by water in foreign commerce] and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

charge violates § 15 of the Act, 46 U.S.C. § 814,[3] because it is a modification, without requisite specific FMC approval, of Cargill's underlying Commission-approved

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[3] 46 U.S.C. § 814 provides in relevant part:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agree-

lease agreement with the Greater Baton Rouge Port Commission (Port); and violates § 16 of the Act, 46

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ment, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

U.S.C. § 815,[4] because it creates illegal preferences and privileges for Cargill through the use of Cargill's wholly-owned subsidiary, Rogers Terminal and Shipping Corporation (Rogers), in competition with Barma at the Baton Rouge facility. The Department of Justice (Antitrust Division), representing the United States as statutory respondent, agrees with the Commission that Barma has not proven a violation of §§ 15 or 16, but disputes the Commission's intimation that it would approve under § 17 an allocation of the charges to the stevedore going beyond express contract, custom, or actual use.

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[4] 46 U.S.C. § 815 provides in relevant part:

> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided,* That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

We affirm the Commission on all counts. Cargill's charge, while unprecedented at Baton Rouge, comes within the broad authority conferred by its Commission-approved lease with the Port and does not require specific approval under § 15. We reject Barma's claim of a *per se* violation of § 16 premised only on the fact that Cargill also does business with its wholly-owned stevedore Rogers, in the absence of proof of discriminatory practices. Finally, we find that the Commission acted within its mandate under § 17; that its approach here in disapproving certain allocations to the stevedore is not arbitrary or capricious; and that its order does not prevent an interim levy by Cargill pending further determination of what may properly be assessed against the stevedore. We decline to consider the Justice Department's contention because it was neither raised before the Commission nor advanced by Barma in its petition for review.

I. *Background*

By a lease agreement the Port granted Cargill, as lessee, "the exclusive right to operate hereunder a public grain elevator within the Port Area." The Cargill facility opened in September, 1955, and Barma has stevedored vessels there from its inception. In March, 1957, the Port and Cargill amended the lease agreement so as to authorize Cargill to provide stevedoring services and "to condition the loading or unloading of a vessel upon the requirement that Cargill's integrated stevedoring service be used by such vessels." The Commission's predecessor agency, the Federal Maritime Board, approved the basic lease, but disapproved the exclusive stevedoring amendment under § 15 and as an "unreasonable practice" under § 17, *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648, 655-56 (1959). The Court of Appeals for the Fifth Circuit affirmed, *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86

(5th Cir. 1961), *reh'g denied*, 293 F.2d 959, *cert. denied*, 368 U.S. 985 (1962).

As to the dispute in question, on February 4, 1971, Gargill informed Barma and all other stevedores using its Baton Rouge facility that charges would be imposed for use of services and facilities.[5] Several days later, Cargill demanded that the stevedores sign an agreement requiring payment of 5-cents per ton of grain handled by Cargill and $50.00 per vessel to defray the cost of cleaning the dock (J.A. 313).[6] Since Cargill indicated it would not deliver grain to a vessel employing a non-signing stevedore, Barma signed "under protest and with full reservation of its rights" (J.A. 319-20). Informed by Barma of the stevedore charges, the General Counsel of the Port wrote to Cargill asking that they be postponed until their legality could be determined (J.A. 303). The Port, however, made no formal complaint and did not participate in the FMC proceeding. On March 29, 1971, Barma filed a complaint with the Commission resulting in the administrative actions under review here.

II. Section 15

Barma claims that the action by Cargill represents a wholly novel and unanticipated practice that constitutes a modification of its agreement with the Port of Baton Rouge, and hence under § 15 is not effective until ap-

[5] Cargill had not previously charged stevedores for the use of terminal services and facilities at Baton Rouge, although it had done so at the Port of Houston in 1967. Four other Louisiana grain elevators had instituted such charges, although Cargill's main competitor, the public grain terminal at New Orleans, had not done so.

[6] During the course of the administrative hearings, Cargill informed the stevedores that the charge would be increased to 8-cents per ton, effective 30 days after the date of a Commission decision in Cargill's favor, and this would include the dock clean-up charge (J.A. 395).

proved by FMC. FMC's ruling rejecting this claim has two aspects: (1) that the lease to Cargill gave it a broad authority which embraces such a practice even though it was not specifically foreseen; and (2) that Cargill's exercise of what it understood to be its authority under the lease—even if it was wrong—was a unilateral action, and not an "agreement" requiring FMC approval.

We reject the FMC's alternative ground, that Cargill's action was a unilateral undertaking and not an "agreement" subject to § 15, for this might open the door to evasion of § 15, through unilateral actions by one party to an agreement and failure to protest by the other.[7] However, we agree with the FMC that the lease between the Port and Cargill can fairly be read to authorize the terminal operator to seek a return on his capital improvements by levying charges against those parties reaping the benefit of his equipment. There is room for deference to the agency on the interpretation of industry agreements[8]—though, of course, less than is due for findings of fact. The language of the lease is broad enough to give Cargill the same charging authority in this respect as any operator of such a terminal—subject, of course, to FMC regulatory authority, and subject to the

[7] Moreover, if Cargill enjoys unilateral authority to impose novel charges without seeking prior approval under § 15, because any such unilateral course is not an "agreement" subject to that provision, the corollary is that there would be no § 15 immunity against antitrust actions, if, *e.g.*, Barma or the Department of Justice should bring an action charging that Cargill and its stevedore subsidiary have entered into a combination or contract in restraint of trade.

[8] United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103, 114 (1958); Gulf States Utilities Co. v. FPC, —— U.S.App.D.C. ——, ——, 518 F.2d 450, 457 (1975); North Atlantic Westbound Freight Assn. v. FMC, 130 U.S.App.D.C. 122, 124, 397 F.2d 683, 685 (1968).

requirement that the charges be competitive (and not cause a loss of business to any other port).[9] The FMC approved the agreement by which the Port gave the lessee this operating authority—and thenceforth the lessee made individual decisions like any other operator within the bounds of the lease. This is not a case of a fundamental change in ratemaking methodology that gives a whole new competitive direction to ratemaking authority. Contrast *Pacific Westbound Conference v. FMC*, 440 F.2d 1303 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971) (§ 15 approval required for agreement between two ratemaking conferences conferring mutual veto power over certain rates).

Barma argues that Cargill and the FMC are barred from relitigating the issue whether the underlying lease agreement governs the relationships between Cargill and stevedores because the Fifth Circuit answered this in the negative in *Greater Baton Rouge Port Commission v. United States, supra.* There is no merit to this res judicata argument. The issue determined by the Fifth Circuit was whether Cargill's lease with the Port and an attempted amendment to establish an *exclusive* stevedoring arrangement were subject to § 15; Cargill's ratemaking power under the lease as to stevedores was simply not at issue. The language quoted by Barma to the effect that the amendment broadened the lease to reach stevedores[10] must be viewed in the context of what was

[9] The lease required that Cargill "establish and enforce reasonable rules and regulations in the operation of the leased property"; "maintain and operate the same in an efficient manner"; and "maintain and publish rates and charges for the handling and storage of grain . . . on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf Ports" (J.A. 294).

[10] The Port Commission and Cargill contend that Agreement 8225-1 does not come within the purview of Section 15 of the Shipping Act, and that these provisions merely

actually decided; an exclusive stevedoring arrangement would indeed have entailed a modification of the agreement.

represent the exercise of the free right of managerial judgment by the Commission as owner and Cargill as operator of the property. But if Agreement 8225 comes within Section 15, as we have held, then *a fortiori* Agreement No. 8225-1, which broadens the lease to include stevedores—clearly a maritime concern—comes within Section 15.

287 F.2d at 94.

Barma also quotes the following language from the Federal Maritime Board's opinion in the *Greater Baton Rouge Port Commission* litigation, which was substantially incorporated by the Fifth Circuit in its decision, *id*:

> There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being. The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedore must signal terminal personnel in order to control the flow of grain.

Agreements Nos. 8225 and 8225-1, supra, 5 F.M.B. at 651. This language is quoted out of context, for the issue addressed is whether primary regulatory authority over Cargill's activities with respect to stevedoring rests with the Department of Agriculture or the Federal Maritime Board. The determination that stevedoring is essentially a maritime matter within the Board's purview has no bearing on the issue in this case—whether the terminal operator furnishes services and facilities to the stevedore for which charges may be assessed. The fact that stevedores may perform no services on the leased premises does not mean that they do not derive benefit from them.

III. Section 16

Barma claims that Cargill's charges against it are a *per se* violation of § 16 because Cargill employs its wholly-owned subsidiary, Rogers, as a competing stevedore. This was properly rejected by the Commission, which reasoned that as long as Cargill's terminal is open to all stevedores and its charges are imposed equally against all stevedores (including its subsidiary) there is no "unreasonable preference or practice" under § 16. Barma has made no showing that Cargill's charges have in fact harmed its competitive position vis-à-vis Rogers, although Barma may have suffered some decline in profits.[11] While, as the Commission noted, the situation in this case "could give rise to discriminatory practices" (J.A. 69), the record simply does not support Barma's apprehension that Cargill intends by predatory practices to drive it out of the Baton Rouge Port.

IV. Section 17

Regarding its authority under § 17 as extending to the "practices" by a terminal operator of levying charges against stevedores for services rendered by its grain elevator, the Commission found Cargill's 8-cents charge against Barma an "unreasonable practice" to the extent it relied on certain improper allocations.

It is true, as Cargill notes, that the FMC's scope of scrutiny under § 17 is somewhat narrower than with respect to common carriers by water in domestic and foreign commerce. But under *Volkswagenwerk v. FMC*,

[11] As the record presently stands, Barma has lost none of its share of the stevedoring market at Baton Rouge and has actually increased its share during the first six months of the charge, primarily because Barma's rates did not reflect the new Cargill charge during this period (J.A. 17). On some occasions, Cargill as charterer has chosen Barma rather than Rogers to act as stevedore (J.A. 205).

390 U.S. 261 (1968), the agency's ambit of inquiry is nonetheless substantial. The Supreme Court specifically held that "even though the benefits received are clearly substantial," the "proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered." 390 U.S. at 282. *See California v. United States*, 320 U.S. 577, 584-85 (1944). That was the inquiry undertaken by the Commission in this case.

One can make the economic argument that there is no difference in the long run whether the cost of the grain elevator is charged to the stevedore rather than the vessel, because the charges will be passed on to the party, usually the vessel, employing the stevedore to load and trim the vessel. In the long run, the stevedore's charge will be borne by the ultimate beneficiary of the services, the consumer, regardless of whether the stevedore is employed by and paid in the first instance by the vessel or shipper. But at least in the short run, different consequences will attach to differences in the immediate incidence of the charges, depending on the documents negotiated and entered into by the parties prior to the imposition of the new charges. Moreover, the separation out and identification of the various charges may have a kind of psychological spillover effect on the behavior of the various parties, which the Commission can properly take into account.

The Commission has taken the position, first stated in *Pacific Northwest Tidewater Elevators Ass'n*, 11 F.M.C. 369, 388 (1968), that the contractual division of responsibility between the buyer and seller of grain does not control the proper allocation of terminal costs, and that those costs should be distributed, to the extent possible, in accordance with "actual use." This analysis, however primitive as a matter of economic theory, is in our view a reasonable interpretation of the Commission's mandate under § 17.

Here the Commission has ruled that while the grain terminal is rendering services to the stevedore, it is an "unreasonable practice" under § 17 to assess stevedores to the extent of 50% of the cost of the shipping gallery,[12] 100% of the costs of the grain dock and wharf, $50 per vessel for dock clean-up, and $25,000 per year for liaison service, because these charges do not reasonably relate to services now rendered to the stevedore based on actual use. The Commission reasons that to the extent benefits of increased efficiency are conferred by the grain terminal beyond actual use by stevedores, the attendant costs are properly assessable against the immediate beneficiaries: the vessel, which can make more trips because of the vastly shortened loading time, and the shipper, who can have his grain loaded at greatly decreased cost per ton (J.A. 72).

Cargill says there is no evidence of such benefits to the vessel or shipper, and that the only testimony is that of its expert, Philip E. Linnekin. There are two answers to this: (1) The cross-examination of Linnekin brought out that he had not really made a quantitative determination of benefits to the stevedore, and that he was in a sense relying on his general experience and economic theory (J.A. 215-16); (2) The matter is one of judgment in determining benefits under the so-called Freas Formula, really an approach based on fairness and benefits.[13] The FMC has expertise and familiarity

[12] Cargill's expert first estimated that the stevedores should bear 75% of the cost of the gallery, then revised it to 50% (J.A. 34).

[13] The Freas Formula, developed by Howard G. Freas in connection with *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948), involves a two-step determination of (1) total cost as divided by functional area, and (2) the appropriate revenue item from each benefiting user of the service or facility to produce a compensating revenue for the marine terminal. As Cargill expert Linnekin testified, "[i]t is important to note that while the method is called a 'formula,' it is not an immutable equation. Rather, it is a set of principles which when combined with the judgment of a trained analyst, provides a reasonable assessment of costs, and a fair and reasonable allocation of those costs." (J.A. 364).

with the concepts, and so long as it gives its reasons and the basis of its approach, the FMC is not to be faulted because it did not put on an expert to make a recital of its approach in the form of testimony.

Here Cargill did not file a petition for reconsideration, or offer a witness to testify that the FMC's approach was unreasonable. While Cargill expert Linnekin testified as to how *he* would recommend an allocation, as a matter of his "judgment" (J.A. 364), he did not say that this was the only allocation permissible under pertinent principles of regulatory economics.

The court does have a supervisory role—to assure that the agency does not embark on a course that is arbitrary or capricious. But the function of the reviewing court is limited. We have no warrant for condemning the FMC's approach here as unreasonable or arbitrary. The ultimate questions involve judgment, and we cannot say that FMC's approach is without rationality, although were the decision ours we might slice the pie differently.

Admittedly Cargill finds little solace in being able to assess the shipper because Cargill is the shipper here.[14] However, the Commission can insist on a proper allocation among the benefited parties, disregarding the happenstance that a given party may occupy several roles. If the distribution of the benefit is such that the shipper is properly assessable where there is no relationship between the terminal operator and the shipper, the same allocation applies where they are one and the same. In any case, Cargill's dilemma is only in the short run, for

[14] Cargill owns approximately 90 to 95 percent of the grain it handles at the Baton Rouge facility (J.A. 175-76).

if the ground rules are now clearly stated, it will be able to recoup the charges assessable against the shipper by getting more from the consignee in future transactions. At the oral argument, it was said that at Baton Rouge it is customary for the shippers to sell F.O.B. vessel (J.A. 163), placing the responsibility on the consignee to procure the vessel, but even if the documents are not phrased in that form the actual cost of the supplies on board the vessel is the dominant economic fact of life, which determines how much the consignees will pay the shippers for the grain itself.

The question of whether the Port's reservation of "dockage" precludes Cargill from charging "wharfage" to the vessel is not before us.[15] The FMC would permit charges associated with the shipping gallery allocable to the stevedore to be assessed as "wharfage" against the vessel (J.A. 73 & n.29). We need not consider what the FMC would have done, and for what reasons, if it had been confronted with a case where the Port prevented

[15] The lease provides that "[n]othing herein shall be construed as prohibiting the Port from charging normal and competitive dockage fees chargeable to ships using the facilities; but wharfage fees chargeable against the grain shall not be charged" (J.A. 296). The lease thus precludes Cargill from charging "dockage," defined by both the Port's tariff and the Commission's regulations as a charge against the vessel for tieing up at a dock or wharf, *see* J.A. 301; 46 C.F.R. § 533.6(d)(1) (1974). But it is silent on whether Cargill may assess "wharfage" against the vessel. The Commission defines "wharfage" as a charge "against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves . . . . for [its] use of [the] wharf," *see* 46 C.F.R. § 533.6(d)(2). While the Port's tariff recognizes "wharfage" as a charge separate and distinct from "dockage" and based upon the movement of cargo over a facility rather than tieing up there, it defines the term as "a charge against cargo," see J.A. 301. Whether this definition precludes such a charge against the vessel should be addressed by the Commission.

the terminal operator from levying any charge on the vessel.

Cargill further claims that the Commission's order prevents any assessment against the stevedore until the ALJ on remand determines what constitutes a proper allocation to the stevedore. While the Commission's ruling lacks clarity, we do not read it to say Cargill cannot in the interim levy a charge against the stevedore for "actual use" of the grain terminal. The Commission's position at oral argument was that Cargill must follow the usual procedures under the Commission's General Order 15, 46 C.F.R. § 533.3, and file a tariff with charges based on an allocation consistent with its ruling. Here Cargill failed to file a tariff in the first instance, which the Commission found to be an independent violation of section 17 (J.A. 75)—a ruling endorsed by all five members of FMC, and not appealed by Cargill. The Commission, far from preventing Cargill from charging Barma, specifically ordered Cargill to "file forthwith any and all charges and conditions within the limits authorized by this decision which Cargill intends to impose" *id.*

Cargill's failure to file a tariff does not, in some mysterious fashion, render improper the Commission disposition and remand. Picking up on the point raised by Commissioners Barrett and Morse in their partial dissent, Cargill urges that the Commission in effect has issued an interim injunction, a remedy it does not have under this court's ruling in *Trans-Pacific Freight Conference of Japan v. FMB*, 112 U.S.App.D.C. 290, 302 F.2d 875 (1962). In that case, however, Judge Washington held that the Commission was not authorized under § 15 to issue a restraining order *pendente lite* where the only justification advanced was a finding of irreparable injury and there was no finding of a violation of the Act. *Trans-Pacific Freight Conference* is inapposite here,

where the Commission is acting under § 17 and has found a violation of that provision, and where charges cannot be levied forthwith in view of the terminal operator's failure to file a tariff. The Commission's course here seems clearly within its powers as outlined by Justice Frankfurter in *California v. United States*, 320 U.S. 577, 582 (1944). There Justice Frankfurter stated that on finding a violation of §§ 16 and 17, "the Commission was charged by law with the duty of devising appropriate means for their correction," which included issuance of "an order generally prohibiting further preferential and unreasonable practices, leaving the parties to translate such a generality into concreteness and to devise their own remedies." Thus, while under § 17 the Commission "may" prescribe a "reasonable practice" as a remedy for a § 17 violation, under the *California* decision it may declare the charges to be an "unreasonable practice" and leave to Cargill the option in the first instance of filing a tariff carrying charges consistent with § 17 and the FMC's ruling thereon.

At the oral argument there was some discussion of the consequences of Cargill's filing of a tariff for a 5-cents charge subsequent to the issuance of the FMC order under review. That is not a part of the record and case before us.

The Department of Justice (Antitrust Division) claims that the FMC went too far in the authorization of charges to Barma. The Department says that charges can only be based on (a) express contract with the persons charged; (b) a custom at the port, possibly on the theory that this gives rise to an implied contract; or (c) actual use, in which case there is either another kind of implied contract or a subjection to reasonable tariff regulation.[16] And the Department says that the

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[16] The Justice Department agrees with the Commission's determination as to Cargill's allocations to the stevedore for

benefits ascribed to use cannot be the kind of benefits inherently accruing to a stevedore whose employees never set foot on the dock, as an "incidental beneficiary." In rebuttal, FMC counsel puts it that even a stevedore whose employees row to the vessel use the dock when they attach to the spout on the dock.

Barma sought review only on the ground that Cargill's charges violated §§ 15 and 16.[17] Cargill opposed the FMC's authority under § 17 to limit its charges against stevedores. There was no appeal to this court by anyone on the ground that, assuming §§ 15 and 16 to be inapplicable, the FMC contravened § 17 because it did not place sufficient limits on what might be charged to a stevedore. The approach of the Antitrust Division was neither presented to the FMC, nor made the subject of a petition to review. We have no jurisdiction to rule on its merits.

Affirmed.

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the shipping gallery and dock clean-up and liaison service, although for different reasons. As to the wharf and utility allocations, it would expressly condition the charge on actual use by the stevedore; as to overhead, it would require a recalculation to reflect the reduction in other charges to the stevedore resulting from the Commission's decision. Brief for the United States of America at 12.

[17] Whatever contention Barma may have previously made that *any* charges against the stevedore would constitute an "unreasonable practice" under § *17* was abandoned in this appeal. Indeed, Barma filed a brief as intervenor in No. 75-1018, involving Cargill's petition for review, endorsing the Commission's application of § 17.

FEDERAL MARITIME COMMISSION

SERVED
JANUARY 7, 1975
FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

Charges assessed and conditions imposed by respondent upon all stevedores operating at its leased terminal facility do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.

No unreasonable preference or privilege as contemplated by section 16 First of the Shipping Act, 1916, resulted from the imposition by respondent of charges and conditions on all stevedores,including respondent's subsidiary.

The relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores as unduly anticompetitive or discriminatory, especially in the absence of proof of actual damage to the complainant.

Assessement of charges and imposition of conditions upon stevedores found not to be reasonably related to the economic and commercial benefits derived by the stevedores, and thus to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

Failure to file new assessed charges and imposed conditions in terminal tariff found to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

The matter is remanded to the Administrative Law Judge for resolution of the sole issue of achieving a proper allocation formula with regard to actual benefits derived by stevedores from use of terminal facilities and for arriving at a proper charge against stevedores based thereon.

Edward S. Bagley for Baton Rouge Marine Contractors, Inc.
Edward Schmeltzer and *E. J. Sheppard IV* for Cargill, Incorporated.
Donald J. Brunner, Margot Mazeau and *Patricia E. Byrne* as Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman, and James V. Day, Vice Chairman. Ashton C. Barrett and Clarence Morse, Commissioners, concurring and dissenting. George H. Hearn, Commissioner, concurring and dissenting.)

I. PROCEEDING

This proceeding arises from a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA or complainant) on March 29, 1971, alleging that Cargill, Inc. (Cargill or respondent) has violated and continues to violate section 15, 16 and 17, Shipping Act, 1916 (the Act), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had

previously been approved by the Commission. The subject modification allegedly imposed unlawful charges and conditions upon stevedores conducting business at the marine grain elevator at Port Allen (Baton Rouge), Louisiana, and was not filed with the Commission. BARMA seeks a cease and desist order.

Cargill denies any modification of the lease agreement, unilateral or otherwise, or that it has violated the Act. Respondent admits to having informed BARMA that it would not deliver grain from the elevator to any vessel employing a stevedore who had not agreed to certain proposed charges and conditions, but maintains that such action was lawful, proper and within the terms of its lease agreement. Hearing Counsel intervened in the proceeding.

Hearings were held in New Orleans, Louisiana on November 30 and December 1, 2, and 3, 1971, and on April 24 and 25, 1972, in Washington, D.C.

In his Initial Decision served December 1, 1972, Administrative Law Judge Ashbrook P. Bryant concluded that the charges assessed and the conditions imposed by Cargill upon the stevedores as a prerequisite to loading grain on vessels at Port Allen constitute a modification of the lease agreement between Cargill and the Port previously approved by the Federal Maritime Commission, and the execution of that modification without prior filing with and approval by the Federal Maritime Commission, and the execution of that modification without prior filing with and approval by the Commission violates section 15 of the Act. He also found that the charges and conditions imposed by Cargill, with minor exceptions, were not reasonably related to the economic or commercial benefit of the stevedore from the use of facilities and services provided by the terminal, and thus constitute unjust and unreasonable practices violative of section 17 of the Act. Accordingly, the Administrative Law

Judge found that Cargill should cease and desist from assessing, charging and collecting the fees and charges and imposing the regulations found to be unlawful.

As to the possible section 16 violations, the Administrative Law Judge found that the relationship between a terminal operator and a wholly-owned stevedore does not in and of itself render charges assessed and conditions imposed equally on all stevedores unlawful as unduly anti-competitive and discriminatory, especially in the absence of proof of actual damage to the complainant. While a substantial competitive advantage may accrue to the parent-subsidiary combination from the assessment of charges and imposition of conditions on all stevedores, including the subsidiary, no unreasonable preference or privilege of the type contemplated by section 16 First of the Act has been shown.

BARMA filed exceptions to the Initial Decision on December 15, 1972, as did Cargill and Hearing Counsel on December 18, 1972. All parties filed replies to exceptions on January 12, 1973. Oral argument was held on March 7, 1973.

II. FACTS

Parties

BARMA, a Louisiana corporate entity, is equally held by four contracting stevedores and/or steamship agents, T. Smith & Son, Inc., Strachan Shipping Company, Atlantic & Gulf Stevedores, Inc. and Texas Transport and Terminal Co., Inc.

Cargill is incorporated in Delaware and with home offices located in Minneapolis, Minnesota. It is engaged in selling, loading, unloading, storing and delivering grain and related commodities, exporting much of the grain through 12 terminals it operates, including the Baton Rouge facility. At

Baton Rouge, Cargill is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

Rogers Terminal and Shipping Corporation (Rogers) is a wholly-owned subsidiary of Cargill and operates as a general cargo and grain stevedore company/steamship agent with operative offices at Baton Rouge.

The Port owns the grain elevator herein discussed, and is a regulatory agency of the State of Louisiana. The Port is engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

History

In 1955, the Port leased the grain elevator and wharf at Baton Rouge to Cargill. The four stevedore firms mentioned earlier, following encouragement by the Port, and with the assurances of Cargill that the elevator would remain open competitively, formed BARMA to compete for stevedoring operations at the grain facility.

In August 1956, Cargill replaced BARMA with Rogers, its subsidiary, as sole stevedore on the grounds that BARMA's performance was deficient. Complainant was advised that it was no longer welcome at the elevator.

In March 1957, the Port and Cargill agreed that Rogers should be the exclusive stevedore at the elevator. BARMA refused to withdraw and protested the exclusive stevedore arrangement which was provided for in the lease which the Port and Cargill filed with the Federal Maritime Board

(Board) for approval.[1]

While the Board approved the original lease (Agreement No. 8225), the amendment (Agreement No. 8225-1) was found to "create in Cargill a monopoly over activities which take place exclusively on the vessels and not on terminal property" and to be "detrimental to the commerce of the United States", and that its operation would constitute an unjust and unreasonable practice relating to the receiving, handling and storing of property in violation of section 17 of the Act.[2] The amendment was not approved. Accordingly, BARMA continued to operate as stevedore at the terminal on an "open" basis.

The lease

The lease, a comprehensive and detailed contract covering waterfront land and improvements, is for a term of 20 years from September 7, 1955 to September 6, 1975, with options to renew under certain conditions for additional periods of 10 years each. Cargill has the right to "have, hold, occupy, possess and enjoy the leased premises" during the term and any renewal periods "to the exclusion of all others save and except those using said leased premises with the consent,

1. See *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959). The further agreement [8225-1] was as follows:

   Cargill further is required to and agrees to provide and furnish stevedoring services to vessels loading or unloading at the wharf, it being recognized that vessels loading or unloading should be integrated into the overall elevator operations so as to provide efficient service, both to such vessels and to persons depositing commodities into the elevator. It is to be a reasonable rule and regulation in the operation of the wharf which is part of the leased property, for Cargill to condition the loading or unloading of a vessel upon the requirement that Cargill's integrated stevedoring service be used by such vessels.

2. *Agreements Nos. 8225 and 8225-1*, *supra* note 1.

express or implied, of lessee." The obligations of both lessor and lessee with respect to repairs, renewals, maintenance, replacement and restoration of the premises not reimbursed through insurance proceeds are specified within the agreement, and the rights and obligations of the parties are to be integrated with the overall operations of the Port insofar as is possible without violating the other provisions of the lease. The leased facilities are to be maintained throughout the period of the lease, or any extended period thereof, as a public port facility.

Lessee agrees that it will establish and enforce reasonable rules and regulations for the operation of the facility and will maintain and operate it in an efficient manner and will accept grain without "discrimination between persons desiring to avail themselves of such facilities, as to rates and services." To the extent feasible, lessee agrees to give "preference to this grain elevator over other grain elevators operated by lessee in the Gulf area." Further, lessee agrees to publish rates and charges for the handling and storage of grain competitive to those for similar services at New Orleans and other competitive Gulf ports so as to insure a schedule of rates, rules and regulations competitive and comparable to those maintained in New Orleans and other competitive Gulf ports.

So far as may be lawful, the Port agrees to give lessee "preferential privileges in and to the docks, wharves, roads, and railroad facilities necessary or convenient to the efficient and economical operation of the leased premises and the business conducted therein and thereon." The Port agrees to give Cargill the most favorable rates for services and facilities granted to any other person. The Port's rates shall be "competitive with, and not greater than rates for similar services and privileges charged at other Gulf ports, including but not limited to New Orleans, Louisiana; Galveston and Houston, Texas." Nothing contained in the lease shall be con-

strued as prohibiting the Port from charging normal and competitive dockage fees chargeable to ships using the facilities, but wharfage charges chargeable against the grain shall not be charged by the Port. Cargill shall have the exclusive right to operate a public grain elevator "as defined by law" within the Port area and shall have right of first refusal on any additional grain storage and handling facilities which the Port may construct in the event that the present facilities become inadequate, "on such terms and for such payments as the Port is prepared to make to responsible third persons in good faith."

As before stated, the Board refused to approve the Cargill/Rogers exclusive stevedoring arrangement at Baton Rouge. This decision was appealed; and the Court of Appeals affirmed the Board's decision.[3]

In its report, the Board had described in some detail the relationships among vessel, master, stevedore, and elevator.

> The relation between vessel and stevedore involves trust, reliance, and dependence on the skill, reliability, and efficiency of the stevedore in the performance of an important ship-operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special provision the right of appointing is given the charterer. In all instances, the decision on all matters of loading rests with the master, the vessel and her owners are legally and contractually responsible for the proper loading and seaworthiness of the vessel, and they pay the cost of loading.

3. See *Greater Baton Rouge Port Commission v. United States*, 287 F. 2d 86 (1961), cert. den. 368 U.S. 985.

> There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being. The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedores must signal terminal personnel in order to control the flow of grain. (p. 651)

The decision of responsibility and authority as defined by the Court and the Board remain largely unaltered and are presently operative at Port Allen.

In *New Orleans Steamship Assn. v. Bunge, Etc.,* 8 F.M.C. 687 (1965), an exclusive stevedoring arrangement was not ruled on by the Commission because it was determined that Bunge was not "an other person subject to the Act", and hence we had no jurisdiction. Subsequent to that decision, the Department of Justice, Antitrust Division, instituted an investigation into the exclusive stevedoring at Gulf grain terminals. Consent decrees were entered against several elevators, including Bunge and another elevator located on the Mississippi River below the Port of Baton Rouge, whereby the defendant elevator owners were enjoined and restrained from imposing "any requirement or understanding that stevedoring services of any particular person be utilized" at the elevators by vessels loading there and from "denying or otherwise restricting any person access to and the use of the facilities at the terminal or dock of an elevator in order to

provide stevedoring services for loading at the elevator."

The injunctions did not, however, prohibit the elevator operator from establishing reasonable regulations for access and use of the facilities if such regulations were applicable to all.

In 1966 Cargill was served with a civil investigation demanded by the Justice Department concerning its elevator at Port Arthur, Texas, and had not, in the interim period, imposed any restrictions on the stevedores at Baton Rouge.

Cargill feels that marine terminal elevators provide benefits to stevedores for which the elevator should be compensated. In 1967, when the Houston elevator opened, Cargill instituted the stevedore agreement which has been in existence since that time. All of BARMA's members except T. Smith & Son, Inc., which does not operate at Houston, signed the agreement without complaint.

In 1970, four other Louisiana grain terminals instituted charges and agreements similar to the one at issue. Consequently, Cargill, in a letter of February 4, 1971, and revised February 10, 1971, informed BARMA and other stevedores using its Baton Rouge facility of certain conditions the stevedores must meet to use elevators. The basis agreement now in force provides as follows:

> The stevedore will provide sufficient crews of longshoremen so that the elevator may operate at capacity. The stevedore will pay $100.00 per hour if he fails to provide enough longshoremen. The stevedore will post a $2,000.00 deposit to secure this obligation, and Cargill will pay interest on the deposit.
>
> The stevedore will pay 5¢ per ton of grain handled for services and facilities provided to it by Cargill, and will pay $50.00 per vessel to defray the cost

> of cleaning the grain dock. The stevedore will post a $1,500.00 deposit to secure these obligations.
>
> The stevedore will adhere to federal equal employment guidelines and regulations.
>
> The stevedore will use utmost care in his operations, will hold Cargill harmless from damages caused by the stevedore's operations, and will provide evidence of adequate liability insurance coverage by companies acceptable to Cargill.
>
> The stevedore will provide adequate supervision for his operations, which will be performed in a "workmanlike" manner.

BARMA protested the agreement, but was advised by Cargill that no vessels would be loaded unless the agreement was executed. Accordingly, BARMA signed the agreement under protest. BARMA and Rogers thereafter raised their rates to compensate for the charges imposed by Cargill.

Cargill's initial charges were 5¢ a ton. During the course of the hearings in this case, on December 17, 1971, Cargill advised the stevedores that the 5¢ charge would be increased to 8¢ per long ton, "effective 30 days after the date of the Federal Maritime Commission's decision in Docket 71-29. . ."

By letter of February 13, 1971, the Port protested the proposed increase and requested Cargill to cancel or postpone the increase until it could be considered and legally resolved. While the Port did not intervene in the proceeding, its executive director testified that the Port considers Cargill's action in imposing "charges on vessels utilizing the facility or the stevedores hired by them to serve those vessels" as a violation of the lease agreement, "detrimental to the Port of

Greater Baton Rouge", and tending to reestablish Rogers as an exclusive stevedore through the manipulation of the access charges and stevedoring rates. Since there are no access charges at the Public Grain Elevator in New Orleans, which is the primary competitor of the Baton Rouge Grain Elevator, the Port Commission fears that the Cargill charges against stevedores, which are being passed on to the vessel, may render the Port noncompetitive; however, there is no apparent substantiation of this fear.

III. INITIAL DECISION

The Administrative Law Judge initially looked to the lawfulness of the charges and conditions imposed by Cargill. Cargill's position, as earlier stated, is that its actions are, within the authority and powers granted to it under the lease, completely legal and no modification of its section 15 agreement has been effected.

BARMA and Hearing Counsel urge that Agreement No. 8225 has been unlawfully modified by Cargill's unilateral action. The Administrative Law Judge, in his consideration of the matter, reviewing the lease arrangement at Baton Rouge, found "reasonable doubt" that the original lease intended to and did clothe Cargill with authority to impose the charges and conditions it did.[4] In its brief, Cargill further contends that, arguendo, even if its actions resulted in a

4. Cargill explains that the lease gives it only "preferential" and not exclusive use of "the docks, wharves, roads, etc." only because of a "peculiarity" of Louisiana law which prohibits a state body from "leasing" certain waterfront facilities, such as docks, to any person. Cargill asserts that in order to comply with this law and still give terminal operators and others a maximum degree of control over "premises for which they are paying", the Port Commission has adopted a concept of "privileged use", which, according to Cargill, in every material respect is the same as a full lease.

modification of the agreement, since that modification was unilateral (the Port having no part in the assessment of charges and conditions upon the stevedores) and not "joint or cooperative" as envisioned by section 15, such modification would not be subject to section 15 and thus not need Commission approval.

Hearing Counsel point out that there is no precise precedent for a unilateral modification within the purview of section 15, but that since section 15 agreements are not private contracts between private parties, the Commission has the duty to oversee such arrangements where they affect the maritime industry. Hearing Counsel argue that the fact that Cargill acted alone in imposing the charges and conditions does not divest the Commission of its authority to consider the import of the agreement.

The Administrative Law Judge determined that the Act does not permit substantial changes in the effect of a section 15 agreement to be taken lightly. Since the Act is remedial in this nature, any doubt should be resolved in favor of the applicability of section 15, and any modification of such an agreement except in unusually clear cases should be scrutinized by the Commission.

The Administrative Law Judge further observed that the modification did introduce an element into the agreement which was not contemplated at the time the lease was negotiated and, accordingly, ruled that the charges and conditions contained in Cargill's letters of February 10 and December 17, 1971, constituted a modification of an approved agreement requiring section 15 approval.

The Administrative Law Judge, in viewing the Cargill/Rogers relationship found a situation "fraught with potential

abuse", but found no specific evidence on the record to substantiate charges of undue economic disadvantage to BARMA or other stevedores and shippers. He found little doubt that a substantial competitive and economic advantage would accrue to the Cargill/Rogers arrangement from the imposition of the charges herein considered, but, said the Administrative Law Judge, it does not follow *ipso facto* that the charges and conditions are unlawful since the charges and conditions are imposed equally on all stevedores.[5] Accordingly, while the Administrative Law Judge felt the potential anticompetitive effect flowing from the parent-subsidiary relationship should be reason enough to closely scrutinize its charges and conditions for reasonableness, he found no proof of actual damage to BARMA and no unreasonable preference or prejudice resulting simply from the Cargill/Rogers relationship.[6]

As the "crux" of the case, the Administrative Law Judge addressed himself to the question as to whether the charges and conditions imposed on stevedores by Cargill as a prerequisite to doing business at Baton Rouge may be fairly and directly related to benefits derived from the use of the terminals, facilities and services performed by Cargill.

The Administrative Law Judge felt that no violence would be done to generally accepted principals of fairness if such were the case to require BARMA and others to pay for the benefits they receive.

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5. Citing *Pittston Stevedoring Corp. v. New Haven Terminal. Inc,* 13 F.M.C. 33, 35 (1969).

6. Citing *Lake Charles Harbor and Term. Dist. v. Port of Beaumont,* 12 F.M.C. 244, 248 (1969); *Phila. Ocean Traffic Bureau v. Export S.S. Corp.,* 1 U.S.S.B.B. 538 (1936); *Port of New York Authority v. AB Svenska, et al.,* 4 F.M.B. 202 (1953).

Cargill maintains that the charges and conditions are fair. BARMA and Hearing Counsel contend that the facilities and services for which charges and conditions are imposed are not primarily for the benefit of stevedores, and hence, with a minor exception, are unfair and unreasonable.

The Administrative Law Judge then proceeded to discuss the Edwards-Differding Formula and the later Freas Formula used for the determination and allocation of costs in marine terminals in relation to the testimony of Philip E. Linnekin, Cargill's expert witness. Essentially, the Administrative Law Judge, in sifting down the testimony, came to the conclusion that the applicability of the Freas Formula can be affected by the judgment of a trained analyst, by agreement, and/or by custom and usage. To apply the Freas Formula, which historically was applied to general cargo terminals allocating costs between vessel and cargo, to cargo and stevedores, while novel, does produce certain workable data, which the Administrative Law Judge referenced at length in his Initial Decision. Applying that date to formulate charges and conditions and thereafter imposing these charges and conditions upon stevedores is not unlawful, he found, provided the charges and conditions are fair, reasonable and related to facilities and services provided stevedores for their benefit. As support for this position, the Administrative Law Judge noted that several competitive grain elevators now assess similar charges and conditions, and there is no evidence of record that Baton Rouge has lost any vessels to the public grain elevators at New Orleans, although that elevator does not impose like charges and conditions.

The Administrative Law Judge discussed particular "benefits" to stevedores including a shipping gallery and grain dock. The shipping gallery is a "highly refined" mechanical conveyor system for delivering grain from the elevator to the

vessel, without which it would take "scores of longshoremen moving grain in bags" to convey equal amounts of grain. The grain dock, a platform at the river end of the gallery, houses the machinery and the spouts which bring the grain into a position where it can be dumped into the vessel. Additionally, water, toilets, telephones, utilities and dock clean-up and liaison service are also benefits to the stevedores for which it is contended they should pay. Additionally, the Linnekin study allocates land rental charges to the stevedores.

The Administrative Law Judge then discussed each facility and service and arrived at the following conclusions:

1. *The shipping gallery.* According to the rule enunicated in *Greater Baton Rouge Port Commission v. United States, supra,* note 3, the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout over the hold of the vessel. The loading spout can be equated with "ships tackle" or "point of rest" wherein general cargo is considered delivered to the ship. The speed of transit of the gallery is an advantage to the elevator, not the stevedore. The Linnekin study allocated costs initially at the rate of 75 percent of the gallery rental to the stevedore, 25 percent to the cargo; then 50-50. The constructed charges under this theory appear duplicative of the charges to the holders of warehouse receipts, and accordingly the Administrative Law Judge found that the cost of the shipping gallery is not shown to be a proper and reasonable charge against the stevedores.

2. *Grain dock-wharf.* Linnekin states the wharf benefits stevedores because it allows ingress and egress to and from the vessel. However, the Administrative Law Judge found that the vessel is the primary beneficiary of the wharf. However, the cost had been allocated 100 percent against the

stevedores. The wharf included the entire barge unloading facility, pile clusters, the dust collection system, a multiplatform structure, upper and lower catwalks and the spouts. The Administrative Law Judge found that the barge unloading facility is used strictly for Cargill's benefit, the pile clusters are used exclusively by the vessels, and the dust collection system is used to avoid grain dust explosions.

3. *Water, toilets, telephones and utilities.* These items total $933.00 per year and include certain unsubstantiated charges. Basically, the stevedores are being charged for a Cargill-supplied sound powered telephone, fixtures, fuses, bulks and labor and Cargill-furnished electricity for lighting the wharf. Under Cargill's tariff, the vessel is required to furnish adequate lighting for night reception of cargo.

4. *Dock clean-up and liaison service.* These items were allocated at four man-hours per day and costs thereof. The Administrative Law judge found that the dock is cleaned only sporadically and "liaison fees" of $25,000 a year are unsubstantited.

5. *Overhead expenses.* These were allocated at 2.3 percent to the stevedores. Such expenses included Cargill's overall terminal elevator administrative expenses (of which 16.88 percent was allocated to Baton Rouge), Minneapolis branch office administrative expenses, management fees, and New York office expenses.

The Administrative Law Judge summarized his findings as follows:

On the basis of the record the costs allocated to stevedores

as the basis for the charges and conditions imposed by Cargill have not been shown to be reasonably related to use or benefit to stevedores from services and facilities provided by Cargill. The principal facilities upon which the charges and conditions are sought to be justified by Cargill are the shipping gallery and the wharf. Neither facility is maintained and operated principally for the benefit of stevedores. The contention that the "benefit" to the stevedore from the shipping gallery and the grain dock is the transportation of the grain one thousand feet from the elevator to the vessel is not valid. The stevedoring function and, hence this "benefit" to stevedores, does not begin, for all practical purposes, until the grain is delivered at the end of the spout. The fact that the mechanism of the shipping gallery permits more rapid delivery of the grain at the end of the spout benefits the cargo and, perhaps, the vessel. It does not appreciably benefit the stevedore. His function is to properly load the vessel with grain "delivered" by the terminal at the end of the spout over the hold. Cargill's function is to make grain available for loading the vessel by delivering it at that point. Without the shipping gallery in its entirety, Cargill could not deliver the grain from elevator to spout end. Also, the charge to stevedores for the shipping gallery duplicates the charge on holders of warehouse receipts for the same facility. No cost allocable to the shipping gallery may properly be charged to the stevedore.

Since the Port Commission, under the terms of the lease, charges vessels for the use of the wharf though dockage fees, no part of the cost of the wharf may properly be charged to stevedores. It does not appear that either the clean-up charge or the liaison charge is justified on the basis of this record. Nor is the allocation of overhead justified on the basis of the record.

The Administrative Law Judge thereafter discussed the four regulations Cargill has imposed upon the stevedores, to wit: (1) requiring execution of an agreement that the stevedores will exercise "utmost care" in conducting their operations, coupled with a contractual indemnity agreement; (2) insurance coverage in specified amounts written with companies acceptable to Cargill's reasonable satisfaction; (3) $100.00 per hour liquidated damages for delays caused by stevedores; and (4) deposits totaling $3500.00 to secure payment of the charges. The Administrative Law Judge found the standard of "utmost care" unreasonable and the indemnity agreements unfair as against public policy. He found the insurance requirement susceptible to abuse in that Cargill must be "reasonably" satisfied as to which company writes the policy. The $100.00 per hour liquidated damage provision is a one-sided arrangement. The Administrative Law Judge felt that BARMA was entitled to a reciprocal clause. Lastly, he found the deposit of $1500.00 to secure payment of the access and dock cleaning charge to be unreasonable and unsupported by facts; however, the $2000.00 deposit to secure payment of liquidated damages was found to be reasonable, if Cargill posted a similar deposit for delays it caused.

One argument raised by Hearing Counsel in its Answer and rebutted by Cargill in its Reply was that Cargill's failure to file the subject charges and regulations in its terminal tariff is violative of Section 17 of the Act. The Administrative Law Judge did not address himself to this issue in the initial decision, but we will consider it in our final determinations.

IV. EXCEPTIONS

Exceptions and replies were filed by all parties in the proceeding.

BARMA excepts to the initial decision on the single ground that it is in error as a matter of law, in that it fails to hold that the compulsory imposition of the charges against stevedores by Cargill in its dual role as a terminal operator and stevedore is unlawful *per se*, is unduly anticompetitive and discriminatory, constitutes an unreasonable preference or privilege in violation of 16 First of the Act, and is an unjust and unreasonable practice in violation of section 17 of the Act.

Complainant urges that because of the status of the Cargill/Rogers arrangement, it competes with BARMA and is thus levying charges against competitors, an illegal, anticompetitive practice. BARMA calls the Cargill/Rogers relationship a "sham", urging that all that transpires is that when Rogers pays the charges, money merely passes from one pocket to the other. Complainant compares this case to the Commission's decision in *California Stevedore & Ballast Co., et al. v. Stockton Elevators,Inc.,*[7] (hereinafter *Stockton*) and argues that *Stockton* demonstrates precisely why Cargill's scheme is unlawful: i.e., where a terminal operator seeks to compete as a stevedore, either directly or through a stevedore subsidiary, affiliate or subcontractor, any compulsory charge imposed by it against competing stevedores will be unlawful *per se*.

BARMA urges that the substantial competitive and economic advantage obtained by the Cargill/Rogers arrangement constitutes actual damage to BARMA, and because Cargill is capable of absorbing the cost, the practice will eventually put BARMA out of business.

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7. 8 F.M.C. 97 (1964).

Judge's decision insofar as it finds that the charges and conditions imposed by Cargill have no harmed BARMA, are neither preferential nor discriminatory, and do not violate section 16 of the Act. Cargill takes issue with that portion of the initial decision which concludes that the charges and conditions constitute an unfiled modification of a section 15 agreement and that they are unjust and unreasonable practices in violation of section 17 of the Act. Cargill argues that the Administrative Law Judge erred in concluding that this case is an extension of its previous litigation, and contends that the two cases are not related at all.

Cargill essentially reargues its position that it acted unilaterally, and hence the charges it has established were not instituted pursuant to an agreement between Cargill and the Port. Respondent then cites several Commission cases wherein it was held that we have no jurisdiction under section 15 over unilateral action.[8] Cargill urges that it has not modified the initial lease agreement, and that a fair reading of the lease indicates that the Port meant to transfer plenary power to Cargill to deal with stevedores or any other third party at the elevator.

Cargill maintains that lease disputes should be settled by the parties and that the Commission should not act as an umpire of section 15 agreements. As further support for its arguments, Cargill cites *Boston Shipping Assn. v. Port of Boston Marine Terminal Ass'n.*,[9] where the Commission held certain joint activities, to wit: a change in allocation of a

8. See, *Agreement No. T-2423 Between the Port of Seattle, Washington & Pacific Molasses Co.*, FMC Docket No. 70-35, 12 S.R.R. 221, 222 (1971); *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966).

9. 10 F.M.C. 409 (1967).

charge by parties to an approved section 15 agreement, did not constitute a new agreement or modification of the existing agreement. Cargill maintains that the present case, except for the joint activity, is identical, merely involving the shift of a charge from one party to another.

Cargill further argues that the Linnekin studies establish that benefits do accrue to the stevedores, contrary to the Administrative Law Judge's findings that the costs are not reasonably shown to be related to use or benefit to stevedores. Cargill calls this decision erroneous, stating that it demonstrates a complete lack of understanding of the Freas Formula and its use. Cargill urges that the Commission decision in *Rates and Practices of the Pacific Northwest Tidewater Elevators Ass'n.*,[10] in which the Commission at page 390 of that decision adopted the standard suggested by Mr. Linnekin that the Freas Formula (that the loading operation begins somewhere along the shipping gallery) should be controlling, and that the Administrative Law Judge rejects this holding without explanation.[11] Cargill urges reversal of this portion of the initial decision.

10. 11 F.M.C. 369 (1968).

11. Cargill surmises the reason for the Administrative Law Judge's rejection of the "controlling rule" is that the presiding Judge apparently thought that *Pacific Northwest Elevators, supra*, note 10, was inconsistent with the earlier court decision in *Greater Baton Rouge Port Commission, supra*, note 3. The two decisions are in no way inconsistent, says Cargill; *Greater Baton Rouge Port Commission* simply found that the Federal Maritime Board had jurisdiction over marine terminal elevators. In the *Pacific Northwest Elevators* case, seven years later, the FMC exercised this jurisdiction and set principles for cost allocation at the marine terminal elevators. In the instant case the presiding Judge was bound by the *Pacific Northwest Elevators* cost allocation principles.

Cargill cites several "glaring errors" in the initial decision and discusses them as follows:

1. The Administrative Law Judge dismissed the "substantial testimony" that the stevedores benefit from the high output and rapid speed of the elevator.

2. The cost allocated to the stevedores "appears to be duplicative of the charges to holders of warehouse receipts"; Cargill does not find this on the record.

3. A cost item of $933 per annum for water, toilets, telephones and utilities was not susceptible to verification from underlying data. Cargill states its witness Pederson was available for cross-examination.

4. There are no figures to substantiate the sum of $25,000 for liaison services. Cargill states that while it furnished no figures, it did give testimony of its liaison functions and employed full time help in this capacity.

5. Lastly, Cargill says the initial decision rejects any allocation for cost for overhead to stevedores, despite testimony of two expert accountants.

In summation, Cargill requests reversal of the initial decision and dismissal of the proceeding.

Hearing Counsel fully subscribe to the Administrative Law Judge's ultimate conclusions, except to strike and correct certain statements of fact,[12] listing them as follows:

1) Correct certain quoted language from the lease to

12. Such facts have been corrected herein, as necessary.

conform to the specific language of Articles 7, 10 and 17 of the lease.

2) Modify the quoted conditions imposed by Cargill as set forth earlier in this report to read as follows:[13]

> The stevedore will use utmost care in his operations, . . . and will provide evidence of liability insurance coverage with limits as follows:
>
> Employers' liability including coverage under Federal Longshoremen's and Harbor Workers Compensation Act - $100,000;
>
> Comprehensive general liability including automobile:
>
> (i) bodily injury - $200,000 each person;
>
> (ii) $500,000 each accident;
>
> (iii) property damage - $500,000 each accident.

V. REPLIES TO EXCEPTIONS

BARMA replied to Cargill's exceptions urging that Cargill has a monopoly in the elevator pursuant to the section 15 agreement and that any actions taken under the agreement are subject to the agreement. BARMA then rebuts Cargill's reference to the "unchallenged" rule of *Boston Shipping, supra,* note 9, urging that the Commission is well aware that the Court of Appeals for the First Circuit reversed the Com-

13. The original language in the initial decision did not specifically state the limits and categories of insurance to be provided.

mission decision,[14] and that the controlling theory in this matter is represented by *Volkswagenwerk v. F.M.C.*[15] BARMA urges again that Cargill's charges and conditions are not justified, and provide no benefit to the stevedore, and that, contrary to Cargill's contention, the decision in *Rates and Practices of Pacific Northwest Tidewater Elevators Ass'n., supra*, note 10, is erroneous and not controlling.

Cargill replied to the exceptions of BARMA and Hearing Counsel, urging that contrary to the position of BARMA, a terminal operator affiliated with a stevedore operating at that terminal may impose uniform charges against all stevedores operating at that terminal may impose uniform charges against all stevedores operating at the terminal. To support

14. See *Port of Boston Marine Terminal Ass'n. v. Boston Shipping Assn.*, 420 F.2d 419 (1st Cir. 1970). BARMA urges, *inter alia*, that this case stands for the fact that modifications of section 15 agreement as well as the original agreement need Commission approval, quoting as follows:

> . . .Section 15 requires that "modifications", as well as the original agreement, receive the prior approval of the Commission. In Boston Shipping the Commission, without any discussion of the broad language of the act held that where, under the already approved agreement, there was power to fix charges, a change in incidence, as to who was obligated to pay, was not a modification requiring Section 15 filing and approval. In the light of the strictures expressed in VW, supra, n. 1, *this holding seems unsupportable. While, with some consistency, it represented the Commission's past reading of the statute, the Court in VW pointed to the "expansive language" of Section 15 and specifically rejected the binding effect of the Commission's administrative construction.* 390 U.S. 261, 272-73. (BARMA's emphasis).

15. 390 U.S. 261, 19 L.Ed. 2d 1090, 88 S. Ct. 929 (1968).

this premise Cargill again cites the *Stockton Elevator* case,[16] urging that no evil results from its relationship with Rogers, as Rogers is also assessed the charges and such charges are reflected in Rogers' tariff. Cargill then refutes BARMA's claims of antitrust monopoly, and urges that BARMA's claims of economic injury are speculative and should be dismissed, as found by the Administrative Law Judge.

Lastly, Cargill urges that BARMA's attack upon the Linnekin study is improper and in error. Cargill agrees with Hearing Counsel's factual exceptions, but disagrees with Hearing Counsel's statement that the errors of the Administrative Law Judge do "not vitiate the ultimate conclusions reached by the Presiding Officer." Concluding its reply, Cargill urges rejection of BARMA's exceptions.

Hearing Counsel replied to Cargill's and BARMA's exceptions and attempted to clarify the record.

Hearing Counsel first address themselves to complainant's exceptions wherein BARMA urged that the Administrative Law Judge failed to find that where a terminal operator seeks to compete as a stevedore either by itself or through a subsidiary, any charges it assesses against competing stevedores would be unlawful *per se*. Hearing Counsel state that the Administrative Law Judge addressed himself to that point and properly decided that charges of this type need not be prohibited solely because one party against whom such charges of this type need not be prohibited solely because one party against whom such charges are assessed is a wholly-owned subsidiary of the operator of the elevator.

Hearing Counsel then review complainant's argument con-

16. See also, *Pittston Stevedoring Corp. v. New Haven Terminal, Inc.* 13 F.M.C. 33 (1969).

cerning the *Stockton* case, wherein BARMA urges the Commission to impose a rule to prohibit any terminal operator with a stevedore subsidiary from assessing any compulsory charge, for any reason. Hearing Counsel say *Stockton* does not support such a conclusion.[17] In *Stockton*, it was the ambiguous tariff, not the terminal operator/stevedore combination, that was the unreasonable practice.

BARMA, say Hearing Counsel, has been attempting to show an antitrust monopoly on Cargill's part. However, say Hearing Counsel, no facts have been adduced to prove this point.

17. Stockton was an elevator operator which employed Jones as its stevedoring subcontractor. It imposed a 15 cent noncompulsory equipment rental charge on all stevedores operating at its elevator *except* Jones. Stockton would bill the vessel on the basis of a flat charge which included all service rendered, the 15 cent charge, and its profit. In at least one instance, the 15 cent charge was not included in Stockton's bill to the vessel. In holding the charge violative of section 17, the Commission said:

> *We agree with respondent that the employment of one stevedoring subcontractor in preference to another or even to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17* . . . [citation omitted]. But that is not the question here. The issue here does not concern who is to be respondent's subcontractor, rather it is the difference in treatment accorded by respondent to Jones, and to itself as a stevedore, on the one hand, as compared with the treatment of complainants on the other. This difference in treatment results from the imposition of the rental charge upon complainants, but not upon Jones. Moreover, it is not imposed *by* respondent acting as owner and operator of the terminal *upon* respondent acting in the capacity of a stevedore, in the same manner as it is imposed upon complainants. (Emphasis added.)

Hearing Counsel then cite Commission precedent in similar matters as follows:

1. A terminal operator is entitled to a fair return on its investment and may make a fair and nondiscriminatory charge for the use of its facilities, citing *Stockton;*

2. Such a fair and nondiscriminatory charge may be assessed against stevedores, provided such a charge is reasonably related to services rendered by the terminal operator to or for the benefit of the stevedore, *Crown Steel Sales, Inc., et al. v. Port of Chicago*, 12 F.M.C. 353, 373 (1967); and *Pittston Stevedoring Corporation v. New Haven Terminal, Inc., supra*, note 5; and,

3. No discrimination results where charges are uniformly applied, *Boston Shipping Association v. Port of Boston Marine Terminal, supra* note 9; and *Terminal Charges at Norfolk*, 1 U.S.S.B.B. 357, 358 (1935).

Hearing Counsel submit that the Administrative Law Judge properly examined the evidence and applied the foregoing standard.

Turning its attention to Cargill's exceptions, Hearing Counsel state that respondent, in citing several cases,[18] misses the point of the decision in these cases, which, contrary to Cargill's interpretation, were decided on the single issue that no agreement was presented since one of the parties in each proceeding had withdrawn.

18. *Agreement No. T-2423 Between the Port of Seattle, Washington and Pacific Molasses Co., supra* note 8; *Inter-American Freight Conference - Cargo Pooling Agreements*, 14 F.M.C. 58 (1970); and *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, supra* note 8.

Hearing Counsel then argue that the Administrative Law Judge correctly determined that the charges and conditions constituted a modification of the section 15 agreement, which modification had not been filed with the Commission for approval.

Hearing Counsel take issue with Cargill's statement that it has plenary power to deal with stevedores and others. Stevedores, say Hearing Counsel, are hired by the vessel and subject to the master of the vessel. Further, the Port has promulgated rules for stevedores, and it is therefore illogical to assume that the Port was transferring "plenary" powers to Cargill to deal with stevedores.

Hearing Counsel then argue that in spite of Cargill's urgings, the Administrative Law Judge distinguished the cases in relying upon the proper cases[19] rather than *Pacific Northwest, supra.* note 10, and properly rejected portions of Mr. Linnekin's testimony. Hearing Counsel find Mr. Linnekin's total testimony in the proceeding to be worthless.

Lastly, Hearing Counsel specifically refute Cargill's five specific errors as being without merit. Hearing Counsel, in summation, find the exceptions of both complainant and respondent erroneous, and urge their dismissal.

VI. ISSUES

The basic issues to be resolved by the Commission are as follows:

19. *Agreement Nos. 8225 and 8225-1, supra,* note 1; *Greater Baton Rouge Port Commission v. U.S., supra* note 3.

Section 15

Do the charges assessed and conditions imposed by Cargill on the stevedores as a prerequisite to loading vessels at Port Allen as set forth in Cargill's letters of February 10 and December 17, 1971, constitute a modification of the approved lease agreement between the Port and Cargill?

Section 16

1. Have Cargill's actions resulted in actual damage to BARMA?

2. Does the relationship between Cargill/Rogers *ipso facto* render the charges and conditions imposed on all stevedores equally unlawful as unduly anticompetitive and discriminatory?

3. Has unreasonable preference or privilege as contemplated by section 16 First of the Act been established from the charges and conditions imposed on all stevedores, including Cargill's subsidiary, Rogers, although substantial competitive advantage exists in the Cargill/Rogers relationship?

Section 17

1. Are the following charges and conditions reasonably related to economic or commercial benefits to stevedores from the use of the facilities and services provided by Cargill:

(a) Eight cents per ton of grain handled for services and facilities provided by Cargill;

(b) $100.00 per hour liquidated damages for failure to

provide sufficient crews of stevedores so that the elevator may operate at capacity;

(c) that stevedore will use "utmost care" in his operations;

(d) that stevedore will provide evidence of adequate insurance liability by companies acceptable to Cargill; and

(e) that deposits totaling $3,500.00 will be posted by the stevedore to secure payment of access, dock cleaning fees and liquidated damages for delays?

2. Should Cargill be ordered to cease and desist from those actions cited under the aforementioned issue found not to be reasonably related to economic or commercial benefits to stevedores?

3. Does the failure to file with the Commission notice of new charges and conditions imposed upon stevedores in Cargill's tariff result in an unjust and unreasonable practice in violation of section 17 of the Act?

VII. CONCLUSIONS

Section 15

It is our opinion that the Administrative Law Judge erred in finding that the charges and conditions imposed by Cargill's letters of February 10 and December 17, 1971, constituted a modification of the Commission-approved lease agreement between Cargill and the Port. Nowhere in the lease is there any restriction on lessee's granted authority to

establish and maintain rates for the handling and storage of grain, saving only (a) lessee could not assess dockage charges, that being reserved to the lessor, and (b) the rates for storage and handling grain must be competitive and comparable with rates at New Orleans and other competitive Gulf ports (Art. 10 of lease - Agreement FMC 8225).[20] In all other respects, relative to rates, rules, and regulations, Cargill was as free of restrictions as it would have been had it owned the facilities.

The lease did not require identical rates. The lease required only "competitive" rates, and, according to the record in this case, the fact that grain has moved and is moving in capacity volume via Baton Rouge is persuasive evidence that the rates are competitive. Some or all of the rates could even be higher than rates at New Orleans and other Gulf ports and still be "competitive" if Baton Rouge were a more efficient elevator, for it is the *aggregate* costs to the merchant (inclusive of speed in loading, waiting time, distance from the Gulf, dockage, etc.) which establish whether the rates are competitive.

What was the extent and scope of the approval given to this lease by the Federal Maritime Board in 1959? We take official notice of our own records relating to that approval action.[21] Our examination thereof discloses there are no con-

20. Article 10 of the lease also provides in part that the rates, rules, and regulations shall be subject "to the approval of public regulatory bodies having jurisdiction thereof."

21. *Swift & Company v. Federal Maritime Commission*, 306 F.2d 277 at 281 (D.C. Cir. 1962).

"... The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."

Trans-Pacific Freight Conference of Japan v. FMC, 314 F.2d 928 (9th Cir. 1963).

ditions, restrictions,or qualifications contained in the Board's order approving the lease, and no record indication of Board consideration ever having been given to imposing conditions, restrictions, or qualifications on lessee's plenary power over rates, rules, and regulations. The Federal Maritime Board having approved plenary rate authority, this Commission may not lawfully modify, reduce, or restrict that approval without initiating and following the notice and hearing procedures established by section 15, Shipping Act, 1916, and section 9, Administrative Procedure Act.

The lease authorized lessee to establish *any* competitive rates for storing and handling grain, and that authorization was not restricted only to those rates or charges which may have been in effect when the lease was adopted. This was a long-term lease and the parties used broad, expansive language in the grant of ratemaking authority, for conditions and needs change with passing time. To have attempted to define every conceivable item of use or service for which lessee was free to assess charges or to make rules and regulations in this long-term lease would have been difficult.[22] Instead, the drafters wisely limited themselves to identifying only those

22. An incomplete list of services, facilities, and uses made available by port elevators as indicated by terminal tariffs on file with this Commission (Koppel Bulk Terminal Tariff No. 1, FMC-T No. 1; North Pacific Grain Growers, Inc., Tariff No. 3) include the following:

Receiving (elevation) from truck, rail cars, barge
Shipping to vessels, rail cars, barges, trucks

Weighing in	Weighing out	Cleaning
Storage	Segregation	Drying
Smutting	Fumigation	Treating for weevil
Blending	Aeration	Cooling
Binning	Turning	Sampling and inspection
Wharfage	Dockage	Line handling charges
Fresh water		

(Footnote 22 - continued on next page)

things which the lessee was not permitted to do.

Cargill is operating under authority granted to it by and within the limits of the approved lease. The charges assessed by Cargill against stevedores constitute actions taken within the lease authority and do not constitute either a modification of the approved agreement or independent action by Cargill taken outside its lease authority. Thus, the charges and conditions imposed on the stevedores by the Cargill letters do not require further approval by the Commission under section 15. We, therefore, reverse those fingings of the Administrative Law Judge with respect to the section 15 issue.

Section 16

With regard to the issue of actual damages to BARMA as a result of imposition of the new charges and conditions, we concur with the Administrative Law Judge. No evidence of record has been presented to show actual damage to BARMA as a result of the new charges and conditions.

We further concur with the Administrative Law Judge in his finding that the relationship between Cargill and Rogers did not in and of itself render unlawful the imposition of the charges and conditions imposed equally upon all stevedores. The record, while indicating that a situation exists that could

(Footnote 22 - Continued from previous page)

Rental of marine leg or sucker
Rental of spreaders and other equipment
Rental to stevedores of storage and office space
Electric power to vessel
Electric power to grain spreaders
Service and facilities charge

give rise to discriminatory practices, does not indicate that any unlawful situation does in fact exist.[23] The Commission has long recognized the legality of terminal operators also conducting stevedoring operations. So long as the Cargill/Rogers relationship remains at arm's length, Rogers pays to Cargill the same eight cents per ton charges as BARMA and other stevedores and no competitive advantage is given Rogers over BARMA and its members, no unreasonable preference or privilege exists that would be violative of section 16 First of the Act.[24]

Reasonableness of Charges and Conditions

The primary issue before the Commission in this proceeding is whether the charges and conditions imposed upon the stevedores by Cargill are just and reasonable within the meaning of the second paragraph of section 17 of the Act, which provides:

23. The record establishes that Cargill has billed and collected the charge in question both from BARMA and from Rogers. If, in order for Cargill to realize a fair return from capacity use of the facilities, Cargill requires, say, $100,000 revenue per year from the assessment on stevedores, then it is obvious that Cargill must collect the full charge per ton no matter who does the stevedoring. Thus, this is not a situation where Rogers will receive a competitive advantage for Rogers must pay the charges in order for Cargill to be made whole. The factual situation here is quite unlike that which existed in *California Stevedore & Ballast Co. v. Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964), where the port elevator failed to assess a charge against its "house" stevedore but did assess the charge against all other stevedores.

24. *Ballmill Lumber v. Port of New York Authority*, 11 F.M.C. 494 (1968); 12 F.M.C. 29 (1968); 13 F.M.C. 262 (1970); *Chr. Salvesen & Co., Ltd. v. West Mich. Dock & Market Corp.*, 12 F.M.C. 135, 141 (1968).

> **Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice.**

Respondents, in the operation of their grain terminal elevators, are "other persons" within the meaning of section 17 and as that term is defined in section 1 of the Act.[25]

Furthermore, the term "practice" as used in section 17 of the Act is associated with rates and charges.[26] We will thus discuss each charge and condition separately.

1. *The service and facilities charge.*

As previously discussed, this charge is to be assessed at eight cents per ton of grain handled for services and facilities provided by Cargill. Respondent contends that this charge is based upon the benefits derived by stevedores for use of its facilities, for which it contends it should be reimbursed. We accept this basic contention. The question then is whether the practices of respondent in its determination and allocation of costs are reasonable. We will examine only the factors which were used to determine the charge as to the reasonableness of each such factor. It therefore follows

25. *California v. U.S.*, 320 U.S. 577 (1944).

26. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 432 (1935).

that if any one or all such underlying factors are found to be unreasonably related to the benefits derived therefrom by stevedores, then the practice of assessing charges based upon those factors is itself unreasonable.[27] This finding would not therefore preclude respondent from assessing a charge against stevedores based upon those supplied services and facilities that were found to be of actual benefit to stevedores.

The basis upon which Cargill seeks to assess the eight cents per ton charge arises under the following services and facilities provided: 1) the shipping gallery; 2) the grain dock-wharf; 3) water, toilets, telephones and utilities; 4) dock clean-up and liaison service; 5) overhead expenses? and 6) trimming machines.[28]

The specific description of each of the above services and failicites has heretofore been discussed under our review of the Administrative Law Judge's initial decision. We will thus only consider the underlying costs to Cargill of each item, the allocation of any or all of that cost to stevedores, and the reasonableness of such an allocation based upon the actual benefits derived by stevedores from the use or availability of that service or facility.

First, we will look at the shipping gallery. Respondent contends that one-half of the benefits derived by use of the shipping gallery flow to the stevedores, the other half flowing to the cargo. Past applications of the Freas Formula to grain

27. *Transamerican Trailer Transport Inc., et al. v. Federal Maritime Commission,* No. 24,019, slip opin. p. 14-15 (D.C. Cir., Jan. 28, 1974).

28. By its letter of December 17, 1971, respondent advised the stevedores of its intention to raise the initial five cents charge (now in effect) to eight cents thirty days after the effective date of a decis-

(Footnote continued on next page)

costs of the shipping gallery to the cargo and one-half to the *vessel.* The Commission has previously approved this allocation. *Rates of Pacific Northwest Tidewater Elevators Association, supra,* note 10. There, as here, Linnekin contended that the cargo benefits equally from the faster loading and greater efficiency made possible by the gallery by lowering the loading expenses. We concur with this contention. The controversy arises, however, over the allocation of the remaining full fifty percent to the stevedores.

The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores. We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel.

(Footnote 28 - continued from previous page)

ion by the Commission in favor of Cargill. This charge would absorb the earlier sought $50 per vessel dock clean-up charge, as well as one cent per ton charge for the use of trimming machines which was not contested.

As Linnekin has stated and past Commission decisions have approved, the cargo benefits to the extent of fifty percent of the allocable expenses associated with the shipping gallery. The remaining fifty percent of allocable expense is thus attributable to the other two beneficiaries, namely the vessel and the stevedore. But not all of this remaining fifty percent can be attributable to the stevedore or the vessel individually. A portion of this remaining fifty percent is allocable to each, and any charge sought to be imposed upon either must be based entirely thereon. Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.[29]

A similar conclusion is reached with regard to the allocation of the total costs of the grain dock and wharf to the stevedores. The Commission in the *Pacific Northwest Elevators* case approved allocation of the total costs of the grain dock to the *vessel*. However, in this proceeding the terms of the lease between Cargill and the Port preclude Cargill from charging dockage to vessels calling at its facilities. Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores. There is, however no prohibition against charging wharfage to the vessel.

Stevedores benefit from the privilege of ingress and egress from the vessel and to some degree from the use of the

29. **The charges associated with the shipping gallery are "wharfage" within the definition of that term under Commission rules (46 CFR 533.6(d) (2)). Inasmuch as the lease only precludes Cargill from assessing "dockage" against the vessel (46 CFR 533.6(d) (1)), this charge would be assessable against the vessel to the extent sought to be imposed on the stevedores.**

spouts, but in no way can the total cost for the use of the dock be attributed to stevedores. The cargo benefits from the use of the spouts, as does the vessel for the same reasons they benefit from use of the shipping gallery. We, therefore, concur with that finding of the Administrative Law Judge that the charge, inasmuch as it relates to use of the barge unloading facility, the pile clusters, the dust collection system, and the spouts to the extent assessable against cargo or vessel, is an unreasonable practice under section 17.

The record provides scant evidence regarding the assessments of charges for the various utilities and overhead expenses associated with Cargill's operation. However, the allocation to stevedores of $933.00 per year for water, toilets, telephones and utilities does not appear to be so unreasonable as to justify disapproval. Nor does the amount of overhead expenses allocated to the stevedores appear to be unreasonable. The costs associated with the use of the trimming machines were not contested.

Those costs, however, which are associated with dock clean-up and liaison service have not been justified on the record. The evidence presented shows that the docks are cleaned only sporadically and that the $25,000 per year for liaison services was unsubstantiated. Those portions of the overall costs which are based upon these factors have therefore not been shown to be reasonably related to the benefits derived therefrom by the stevedores. As such, we find the assessment of any charges based upon these services and facilities to be unreasonable practices within the meaning of section 17 of the Act.

In weighing the overall effect of the various factors used to derive the eight cents per ton charge, we find sufficient

unwarranted allocations of costs to stevedores to sustain a finding that the imposition of any charge which was compiled by use of any of the aforementioned unwarranted cost factors to be an unreasonable practice under section 17. Respondent should thus cease and desist from assessing such charges where based upon costs of services and facilities found herein to be unassessable against stevedores.

2. *The conditions sought to be imposed.*

We find that the imposition of an indemnity requirement of $100 per hour for delays caused by failure to provide sufficient numbers of longshoremen to be an unreasonable practice within the meaning of section 17. This is a one-sided requirement with no compensation awarded to stevedores for delays caused by Cargill. Likewise, the requirements for use of "utmost care" in its operations, for evidence of adequate liability insurance coverage insofar as the insurance companies must be acceptable to Cargill, and for posting deposits to secure payment of the service and facilities charge and the delay indemnity charges are found to be equally one-sided and thus unreasonable practices within the meaning of section 17. With regard to the insurance requirement, it would appear to be sufficient to accept insurance coverage from any company licensed to do business in Louisiana.

Failure to File Schedule of Charges.

The Commission's General Order 15 (46 CFR 533) provides in section 533.3 that all terminal operators (with certain exceptions not applicable here) file ". . .a schedule or tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing,

and/or delivering of property at its terminal facilities." As noted earlier, the Administrative Law Judge did not address this issue in his Initial Decision. We, however, consider that respondent's failure to comply with the aforementioned provision to be an unreasonable practice in violation of section 17 of the Act, and as such do hereby order that respondent file forthwith any and all charges and conditions within the limits authorized by this decision which Cargill intends to impose. We further direct Cargill to cease and desist from all practices found unreasonable herein.

REMAND TO ADMINISTRATIVE LAW JUDGE

We adopt the recommendation of Commissioners Barrett and Morse in their concurring and dissenting opinion that the case be remanded to the Administrative Law Judge for a resolution of the sole issue of the proper allocation of services and facilities benefits to stevedores based upon actual use as outlined in this report, in order to arrive at a charge that can be properly assessed against the stevedores.

Commissioners Ashton C. Barrett and Clarence Morse, concurring and dissenting:

We are not appointed to simply call "balls and strikes". Rather, we are appointed to develop a full record in all cases and to decide matters on their true merits and in the overall public interest and not on mere procedural shortcomings or on incomplete or inadequate record.[30] If there is

30. *Isbrandtsen Co., Inc. v. United States*, 96 F.Supp. 883 at 892 (1951), aff'd. per curiam 342 U.S. 950, quoting with approval: ". . . the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: 'They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let

(Footnote continued on next page)

any question still remaining in the minds of the majority that there exists a reasonable relationship between costs/benefits and the assessment charge in this proceeding, we recommend the matter be remanded for a resolution of this issue, including additional evidence, if necessary.

We are in agreement with Chairman Bentley and Commissioner Day that the charges assessed and the conditions imposed by respondent upon all stevedores operating at the leased terminal facility constitute activities and charges falling within the scope of Agreement No. 8225 and do not constitute a modification to an approved section 15 agreement for which further Commission approval is required.[31]

(Footnote 30 - continued from previous page)

the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. . ."

31. It has been contended that these actions by Cargill constitute an unapproved "unilateral modification" of the approved lease. Absent implied, tacit, or actual consent by Port to the "unilateral modification", we are unable to find an "agreement" between two or more persons approvable under section 15. *American Mail Line Ltd. v. Federal Maritime Commission,* F.2d (CA-DC, June 18, 1974), Slip Opinion page 19: "A unilateral undertaking by a single party does not constitute a section 15 agreement." There may be unilateral action taken by one person beyond the scope of the approved section 15 agreement, but that purely unilateral action is not itself, a section 15 "agreement". As said in *Transshipment Agreement,*

(Footnote continued on next page).

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that no unreasonable preference or privilege as contemplated by section 16 First of the Act resulted from the imposition by respondent of charges and conditions on all stevedores, including respondent's subsidiary.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that the relationship between a terminal operator and a wholly-owned stevedore does not *ipso facto* render charges assessed and conditions imposed equally on all stevedores unduly anticompetitive or discriminatory. On this record there was no proof of undue competition or discrimination.

(Footnote 31 - Continued from previous page)

10 F.M.C. 199, 215 (1966): "It Takes Two to Tango". One who acts unilaterally beyond and outside the scope of an approved agreement subjects himself to the penalties of the Shipping Act, 1916, as well as to antitrust. *Carnation,* 383 U.S. 213.

Commissioner Hearn interprets the approval of Agreement No. 8225 as not authorizing Cargill to make the 5¢ charge against stevedores. Although in this respect the majority is opposed to Commissioner Hearn's views, additional comment is appropriate. *Swift & Company v. F.M.C.,* 306 F.277, 281 (1962) holds:

"The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."

In our opinion, a "delineation" may only be made with the greatest of caution and only after a thorough review of the record and with all appropriate due process safeguards, for, unlike a "modification" under section 15 which has only prospective application and is made only by order, after notice and hearing, a "delineation" has both prospective application and retroactive application, with possible serious economic, Shipping Act 1916, and antitrust implications, particularly in respect to activities taken prior to the "delineation". Such a review has not been made by the Commission in this case.

We are in agreement with Chairman Bentley and Commissioners Day and Hearn that respondent's failure to publish and file the charges and conditions in its terminal tariff is an unjust and unreasonable practice within the meaning of section 17 of the Act.

We agree with Chairman Bentley and Commissioners Day and Hearn that the $100 per hour liquidated damages for delay provision is an unreasonable practice under section 17 of the Act.

We differ with Chairman Bentley and Commissioners Day and Hearn in their conclusions that the 5¢ service and facilities charge[32] is an unreasonable practice under section 17 of the Act.[33] We find and conclude that said charge is lawful, is adequately justified on this record, and its determination, assessment, and collection is not an unreasonable practice under section 17 of the Act.

32. The majority's consideration of the projected 8¢ charge rather than the 5¢ charge now assessed by Cargill is a source of confusion. The charge in effect at the time of hearing and at the present time is 5¢. The 5¢ charge may be raised in the future to 8¢. At the 5¢ rate, Cargill also assesses an additional $50 per vessel to cover dock cleaning. This $50 charge will be eliminated when the 8¢ charge goes into effect. As a result, discussion of the $50 dock cleaning charge with respect to the 8¢ rate is irrelevant and results in a finding of unreasonableness with respect to a nonexisting charge.

33. The majority states that "Charges associated with use of the grain dock-wharf analogous to normal dockage charges against vessels are not chargeable to the stevedores." The 5¢ charge, however, is neither "analogous to a normal dockage charge" nor is it associated with docking. Dockage is strictly limited to the vessel's *privilege of berthing* - a "parking fee" for vessels. Cargill's 5¢ charge, on the other hand, is a charge for the *use* of the terminal facilities and equipment furnished by Cargill and used by the stevedores in the *handling of cargo*. 46 CFR 533.6(d) (1); *Pacific Northwest Elevators Ass'n, supra,* at 403.

We adopt the findings of fact set forth in Part II of the above report of Chairman Bentley and Commissioner Day which are not in conflict with the following supplemental findings:

BARMA has been operating continuously as a stevedoring contractor[34] at the Cargill elevator since the inception of the latter's operations in 1955. In 1956, Rogers, Cargill's wholly-owned subsidiary, began operating in competition with BARMA.

Under the lease, dockage is the only fee the Port may charge vessels calling at the grain elevator. The Port's tariff states that all other fees, rules, and regulations pertaining to the grain elevator are to be found in Cargill's tariff.

The charges and regulations compained of herein are similar to those presently in force at a number of grain elevators in the Gulf area, including Cargill's elevator at Houston, and have been assessed by Cargill to all stevedores operating at Port Allen, including its wholly-owned subsidiary Rogers.

Cargill retained Mr. Phillip E. Linnekin, a partner in the international certified public accounting firm of Main Lefrentz & Co., to study the propriety and reasonableness of

34. Sometimes referred to as "the stevedore". The term "stevedore" as used herein may mean either the stevedoring company (for example, BARMA), or the employee of the stevedoring company. The employee of the stevedoring company is more accurately called a longshoreman, but is not infrequently called a stevedore. Hence, when the term "stevedore" is used it may mean, depending upon the context, either the stevedoring company or the longshoreman. As used herein, the term "stevedore" usually refers to the stevedoring company.

these charges. Mr. Linnekin, an expert in this field, has appeared before the Commission in numerous proceedings and assisted in the development of the so-called Freas Formula which forms the basis for his allocations and methodology in this proceeding. Previous studies in other proceedings were initiated for the purpose of allocating terminal costs between vessel and cargo only. Mr. Linnekin's study in this proceeding considers and justifies the imposition of charges against stevedores on the ground that the stevedores use the terminal facilities and receive benefit from the use thereof.

Mr. Linnekin classified the leased property into the categories of "land" and "improvements". He valued the land on the basis of its original cost, and the improvements on the basis of the original undepreciated construction cost.[35] He determined that the percentages these two categories bear to the total combined value of the land and improvements amounted to 5.4% and 94.6% respectively. Applying these percentages to Cargill's annual rental payments of $673,600, he determined the amount of said payments applicable to each category as $36,374 to land and $637,226 to improvements. Of the land rental, he allocated 7% to the stevedore for the grain dock-wharf, and 93% to cargo.

The largest item allocated to the stevedore is rental allocable to the shipping gallery and to the grain dock-wharf.

The shipping gallery is a conveyor system for the delivery of grain, approximately 1,000 feet long, running from the elevator headhouse to the loading spouts situated on the

35. Utilization of fair market value or original cost depreciated or other valuation formula would have had but *de minimis* effect on the end results in this proceeding.

wharf. It delivers the grain at a loading speed of 1,000 tons per hour and thus permits a faster loading of the vessel than would be possible at a less efficient and less modern facility or by manual loading and stowing of the vessel.

Improvements made by Cargill to the elevator terminal facilities increased the annual volume of grain available for shipment and hence the loading capacity. The turnover rate is 16.5, i.e., the elevator is emptied and refilled sixteen and one-half times during a one-year period. The loading capacity of the elevator has been increased from the original 20 million bushels a year to 113 million bushels in 1971.

Inasmuch as the flow of grain to the vessel is directed by the stevedore's employee (the longshoreman) in respect to the loading and trim of the vessel, the stevedore's function commences at a point somewhere between the headhouse and the water end of the shipping gallery. It is unnecessary in this proceeding to determine where precisely that "point" lies.[36]

36. The statement in *Greater Baton Rouge Port Commission*, 5 F.M.B. 648 at 651, quoted in the majority report, that the function and responsibility of the stevedore does not attach until the grain is discharged from the loading spout is misleading. It is true that physical contact by the stevedore does not occur prior to that time, but directive control over the movement of the grain from the headhouse at the elevator end of the shipping gallery, through the shipping gallery, and thence to the loading spouts is vested in the stevedore's employee (longshoreman) and is effected by signals from the longshoreman to the elevator employee at the headhouse controls. Furthermore, the longshoreman manually moves the direction of the spouts to assure that the grain flows into the proper hatches and areas within the ship's holds. Thus, it is clear that for the purpose of allocating costs as between elevator, cargo, ship, and stevedore, the "point of rest" is definitely somewhere in the area between the headhouse and the wharf. Linnekin utilized that point of rest for cost and benefit allocation purposes.

Questions of ultimate responsibility as to the delivery of the grain at the end of spout or elsewhere, or questions when transfer of title to the grain ultimately occurs, or questions whether the shipper, the vessel, or the consignee ultimately pays the stevedore are questions arising under sales contracts and charter parties and have nothing to do with the question whether the stevedore receives a benefit from the use of the shipping gallery and of the wharf for which a charge may be made.

Mr. Linnekin excluded the portion of the shipping gallery which extends over the wharf from his definition of the shipping gallery. He allocated 50% of the balance of the shipping gallery to stevedores and 50% to cargo.

The wharf, referred to herein also as grain dock-wharf, situated at the water end of the shipping gallery, houses the loading spouts through which grain is discharged into the hold of the vessel. The lower part of the wharf is also used by the stevedore for access to the vessel. Mr. Linnekin defined the wharf so as to exclude the barge unloading facility and dust collection system and to include that portion of the shipping gallery which extends over the wharf from the point that the two form a "T". He allocated 100% of the rental allocable to the wharf to the stevedore.

The spillage of grain on the wharf as well as dust generated by loading operations creates a safety hazard which requires cleaning of the grain dock-wharf after vessel loading. Cleaning the grain dock-wharf requires approximately 16 man hours and may be done only when the dock is free of vessels.[37] Cargill's personnel spent an average of four man

37. 143 vessels spent 260 loading days at the terminal in 1971.

hours a day on dock cleaning, at a cost to Cargill in 1971 of $6,045. The $50 per vessel charge will be incorporated in the proposed charge of 8¢ per ton loaded.[38]

A full-time employee of Cargill is available 24 hours a day, seven days a week, for liaison service to the stevedore. This includes the relay of messages to and from the stevedore and assisting the stevedore in planning and preparing stowage of the vessel, at a cost to the respondent of $25,000 per annum. In light of the services rendered the stevedore, the liaison charge is fully justified.

The 2.3% of the total elevator overhead allocated to the stevedore is based on the percentage that total projected annual revenue from charges against the stevedore bears to the elevator's constructive gross revenue.

The lease authorizes Cargill to assess a facilities and user's charge against stevedores.

The rates and charges assessed by Cargill for the handling and storage of grain are competitive with rates and charges for similar services at other Gulf ports, including, but not limited to, New Orleans.

There is no duplication between the charge assessed by Cargill against the stevedore and the dockage charge assessed by the Port against the vessel, or Cargill's charge to holders of warehouse receipts.

In determining if the 5¢ charge against stevedores is law-

38. The Port Commission tariff also contains a similar charge of $50 per vessel of 3,000 net tons or more, for the cleaning of its general cargo docks.

ful and justified on this record, we must apply the following basic principles of law applicable to terminals:

1. Our ratemaking jurisdiction over rates of terminals rests solely on the second paragraph of section 17 of the Act.

2. We do not have ratemaking power, comparable to our ratemaking authority over common carriers in our domestic offshore commerce, to establish the rates to be charged.[39]

3. We have jurisdiction only to halt rates or practices which we find are unreasonable or unjust and have limited power to translate these statutory prohibitions into "dollars and cents" terms by establishing a minimum or maximum rate.[40]

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39. The Commission does not possess the ratemaking authority over terminal operators under section 17 to the extent of that authority which is held over carriers by authority of the Intercoastal Shipping Act of 1933. *California v. U.S., supra. City of Los Angeles v. F.M.C.*, 385 F.2d 678 (1967). In this area, there need be only a reasonable relationship between the charges assessed and the services or benefits provided. *Volkswagenwerk v. F.M.C., supra*, at 282. *Evans Cooperage Co. v. Board of Commissioners*, 6 F.M.B. 415, 418 (1961).

40. *City of Los Angeles v. F.M.C., supra*, at 681:

"The tariff filed by a port is significantly different from the tariff filed by a common carrier. With respect to the former, the Commission is only authorized to halt rates or practices which are unreasonable or discriminatory. Subject to its limited power to translate these statutory prohibitions into 'dollars and cents' terms by establishing a maximum or minimum rate, the Commission has no ratemaking power with respect to ports. The situation is much different with respect to common carriers, for Section 18 of the Act, 46 U.S.C. § 817, explicitly gives the power to establish the rates to be charged and the carrier is obligated to abide by its effective tariff without exception on pain of criminal fines. We are not prepared to say that the Commission was required to do what
(Footnote continued on next page)

4. It is an unjust and unreasonable practice for a terminal to provide free or charge noncompensatory rates for services or use of facilities for such practice results in imposing a disproportionate share of the cost of the terminal on other users of other terminal services or facilities.[41]

5. In establishing the lawfulness of a charge under section 17, a terminal need establish only that the charge is reasonably related to the service or benefit.[42]

(Footnote 40 - continued from previous page)

Congress has refrained from doing and expand section 18 so as to include ports."

Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., supra - see disclaimer at 371.

This is not intended to suggest that we do not have jurisdiction to correct undue preferences or advantages, etc., under section 16 and other sections of the Act.

41. *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588, 603 (1941). *Investigation of Wharfage Charges at Pacific Coast Ports*, 8 F.M.C. 653, 657 (1965): The Commission, in Docket 555, ". . .found also that the failure of a port terminal to charge compensatory rates for a particular service casts an unfair burden on users of other service in violation of sections 16 and 17 of the 1916 act."

42. *Volkswagenwerk Etc. v. F.M.C., supra*, at 282: The test is ". . . whether the charge levied is reasonably related to the service rendered."

Evans Cooperage Co. v. Board of Commissioners, supra, at 418:

"The first, second, fourth, sixth and tenth exceptions in effect say that the charges are unreasonable because no specific service is rendered to the complainant and that the Examiner did not consider the evidence showing this. The Examiner, however, considered evidence that wharf tollage does not necessarily cover expenses and services directly rendered to the cargo and also gave weight to the opinions of complainant's witness on this point. The Examiner
(Footnote continued on next page)

Several things are to be borne in mind. First, the Freas Formula which has been utilized by the Commission is but one formula or means which may be utilized to equitably spread the costs of owning and operating a port terminal amongst the various users of the facility. The Freas Formula does not purport to be the sole formula or necessarily the best formula. It is adequate, well recognized, and widely used on the Pacific Coast. It should not be used to defeat charges which legitimately should be assessed. The "objective" of the Freas Formula "is to determine costs"; hence, "no consideration was given to value of service and other

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(Footnote 42 - continued from previous page)

found that complainant's barge and the cargo involved enjoyed substantial benefits from the services and facilities provided by the respondent. Complainant's barge was tied to the ship and such mooring would not be possible unless the water berth was dredged deep enough to accommodate the ship and unless the mooring facilities were adequate for the ship. Police protection was also present and not denied to the complainant regardless of the fact that direct vision by the policeman might be difficult. The fire tug was available for protection without extra charge having been levied thus far except for the cost of chemicals used in fire fighting. Both forms of protection had to be paid for by users of respondent's property as well as those who shared in overall benefits, including incidental benefits, of the commission's facilities. The fact that the operators of the ship must also pay charges was considered and not found to be controlling

"Complainant contends that by definition it is an essential element of wharf tollage that the cargo pass over the wharf and that the charge should be for the use of the wharf to avoid being unreasonable. We do not need to be too concerned about other definitions of wharf tollage. The commission has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is whether its facilities are being used and the commission is performing a service reasonably related to its charges. The Examiner considered the evidence and found that it was."

factors which must be considered in determining the level of the rates." Its objective is explained in *Terminal Rate Structure - California Ports*, 3 U.S.M.C. 57, 59-61 (1948), where all wharfinger expenditures were apportioned to vessel and cargo *only* because in that proceeding vessel and cargo were the only interests involved. A vessel was held liable to the terminal for all usages and services from, but not including, point of rest on outbound traffic; all other wharfinger costs were assessed against cargo.

Second, because under the original Freas Formula, all wharfinger costs were allocated as between vessel and cargo, it would appear unnecessary to belabor the fact that a charge may nevertheless be assessed against stevedores or carloaders or other persons for services provided to them or for facilities made available to them and from which they derive benefits. Hence, if a terminal makes a grain spreader available to a stevedore, the Freas Formula does not prevent the terminal from assessing a fair charge for use of that grain spreader. See *Crown Steel Sales, Inc., et al. v. Port of Chicago, supra.* The same reasoning applies to a charge against stevedores for benefits received by them in respect to utilization of the terminal facilities.

Chairman Bentley and Commissioners Day and Hearn concur in the view that a charge would lie against stevedores for benefits from utilization of the facilities, but, so they contend, the record fails to disclose that "the practices of respondent in its determination and allocation of costs are reasonable." We disagree with that latter conclusion. This is not a conventional rate case. The proofs required to establish a reasonable relationship between the charges assessed and the benefits received need not be made with anything like the degree of precision required in a rate case. See *Evans*

Cooperage, supra, where the Commission allowed a charge, stating at 419:

> In view of the finding that there can be no precise equivalence between services rendered and the charges, we would agree with the Examiner that the record contains no basis upon which reasonable allocation of costs could be made. *Terminal Rate Structure - California Ports,* 3 U.S.M.C. 57, 60, 69 (1948).

Despite absence of basis upon which reasonable cost allocations could be made, the charge was allowed because of an affirmative finding that on the facts of that case there could be no precise equivalence between services rendered and the charge assessed. The same principle applies here.

The error of Chairman Bentley and Commissioners Day and Hearn lies in a too narrow adherence to the principles of the original Freas Formula, entirely overlooking and disregarding the stated objective in *that* case of allocating wharfinger *costs* as between vessel and cargo *only*. Actually, the Freas Formula promulgated in 1948 in *Terminal Rate Structure - California Ports, supra,* has been expanded in *Investigation of Wharfage Charges at Pacific Coast Ports, supra,* to authorize wharfage charges at grain terminals (which terminals did not exist on the Pacific Coast at the time the Freas Formula was adopted) as being wharfinger "special facilities" and in *Crown Steel Sales, Inc. et al. v. Port of Chicago, supra,* it was recognized that the Freas Formula "must be varied to recognize local differences in practices, procedures and objectives." That case held, in part, at 373:

> All costs should be apportioned to the various services concerned. There is no question that facility costs are being incurred in connection with (a) stevedoring, (b) truck loading, and (c) wharfage. These costs should be distributed accordingly and the stevedoring portion recovered by the stevedoring business through their contract rates charged the vessel, the truck loading portion by the terminal operators through their truck loading charges or some tariff charge against the cargo, and the wharfage portion through wharfage charges coupled with reduced rents. Although no exhibit was presented, Mr. Linnekin testified that, using actual costs revealed in respondents' operating statements which were disclosed to complainants, he calculated and applied facility costs in accordance with the service apportionment provisions of the Freas Formula. Eventually, of course, the apportionment of terminal service costs for given commodities, as between cargo and vessel, becomes academic because all such costs as well as those of the water transportation are ultimately borne by the cargo importer.

Chairman Bentley, Commissioners Day and Hearn state:

> The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel. Stevedores do not benefit from the speed and efficiency of the shipping gallery to the same extent as does either the cargo or the vessel under past applications of the Freas Formula. As stated above, the cargo benefits by

incurring lower loading expenses. The vessel benefits by having to spend fewer days in port for loading operations, thus allowing it to transport more shiploads over a shorter period of time. But no such benefit can be equated to stevedores. In fact, it can be argued that the speed and efficiency of the shipping gallery works to the detriment of stevedores, providing shorter working hours by fewer men and therefore less revenues to the stevedores.

Crown Steel squarely refutes the generalized statement that "The normal practice followed in past Commission proceedings would allocate this latter fifty percent to the vessel."

That statement is also misleading when it "argues" that "less revenues [accrue] to the stevedores." If it means fewer longshoremen are employed and less longshore wages paid, then it is correct. But longshoremen are not parties to this proceeding, and the impact on them was not an issue in the case. If it means what it says that less "revenues" accrue to the stevedoring contractors (Rogers or BARMA) it is incorrect. The record is clear that at this facility stevedores are paid on tonnage of grain loaded to vessel and that stevedore revenue is not computed on longshore labor costs plus a mark-up for overhead and profit or some other formula; hence, the stevedoring rate per ton multiplied by the number of tons loaded establishes the compensation paid to the vessel's stevedore, and this is so whether a given tonnage takes 24 hours to load or 72 hours to load or whether one gang of longshoremen or ten gangs of longshoremen are utilized.[43] Obviously, with a given tonnage loaded to vessel,

43. Mr. James F. Carrier, General Manager of Rogers, stated on cross-examination that although he anticipated making a profit of 75¢ per ton on grain loaded and stowed manually in sacks, "percentage-

(Footnote continued on next page)

the shorter the loading period and the fewer longshoremen employed, the greater the profit to stevedore.

Chairman Bentley and Commissioners Day and Hearn further state:

> ". . .We recognize that the costs associated with the use of the shipping gallery are allocable to those who derive an economic and commercial benefit from the use thereof. We do not, however, recognize that the stevedores fall into this recipient category, at least not to the degree as that of the cargo or the vessel . . .Therefore, the allocation of a full fifty percent of the costs of the shipping gallery to the stevedores is an unreasonable practice within the meaning of section 17 of the Act.

They assert in Footnote 29 ". . .this [wharfage] charge would be assessable against the vessel to the extent sought to be imposed on the stevedores." "Wharfage" would be directly assessable against the vessel only if the tariff so provided, and the Cargill tariff herein does not so provide. Under our General Order 15 (46 CFR 533.6(d) (2)), wharfage may be assessed against cargo or vessel or both.[44] Whether the ultimate cost may end up as being for the expense of the vessel

(Footnote 43 - continued from previous page)

wise" he was happier with the slightly more than 2 cents per ton profit on grain loaded in bulk at Baton Rouge elevator.

44. In Footnote 29 the majority labels (or likens) the charge assessed for the use of the shipping gallery to "wharfage". "Wharfage", however, as defined in 46 CFR 533.6(d) (2) is a charge assessed against cargo or vessel for the movement or passage of cargo "over, onto, or under wharves or between vessels . . . when berthed at wharf". It is solely a charge for use of the wharf and does not

(Footnote continued on next page)

turns on the terms of the applicable sales contract and charter party. But even if that is the ultimate end result, it is no answer to our problem. *Rates of Pacific Northwest Elevators Ass'n, supra,* at 388. There is neither reason nor logic, other than General Order 15, to restrict the charge to cargo *or* to vessel if in fact an interest other than cargo or vessel receives a direct benefit from use of the facility. This is recognized in *Crown Steel, supra,* when part of the costs of the facility were allocated to stevedoring, part to truck loading, and part to wharfage (cargo), whereas on the Pacific Coast all "this cost is allocated to wharfage." In fact, where two different persons each receive a benefit from a given facility, we have often held it improper to assess the entire charge for that benefit against only one of the recipients. No one contends that the stevedore is not using the terminal facilities and services furnished by Cargill or that the stevedore does not receive some benefit therefrom. Footnote 29 would do violence to the principle that each recipient should bear its fair share of the charge when it states that the 5¢ charge "would be assessable against the vessel to the extent sought to be imposed on the stevedores."

From the above-quoted statements of the majority, it is implicit the majority recognizes that stevedores are recipients

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(Footnote 44 - continued from previous page)

cover the cost of services or the use of any equipment, such as the shipping gallery by which the cargo is moved to the wharf. The shipping gallery here is a piece of equipment similar in its function to a gantry crane or a pipeline. A fee for the use of the shipping gallery may be assessed, therefore, in addition to and separately from "wharfage", just as fees are charged for the use of gantry cranes, forklifts or other terminal equipment as listed in the tariffs of terminal operators generally, and of the Baton Rouge Port Authority specifically.

of benefits from the efficiency of the shipping gallery, albeit, so they contend, not "to the same extent as does either the cargo or the vessel *under past applications of the Freas Formula*"[45] (underscoring supplied) and "the stevedores fall into this recipient category, . . . [but] not to the degree as that of the cargo or the vessel" and "a portion of this remaining fifty percent is allocable to " stevedore and a portion to the vessel.

Here, then, is the crux of our differences. The majority, while recognizing that stevedores are users of the facilities and do receive a benefit therefrom, would disallow all charges against the stevedores solely on the basis that while in past cases costs were allocated, on a judgment evaluation of benefits, 50% to cargo and 50% to vessel, here Linnekin failed to apportion the vessel's 50% of the benefits (or costs) as between stevedore and vessel. Thus, they reason, when cargo is benefited to 50% and vessel and stevedore combined are benefited by a given facility for the remaining 50%, to allocate this full remaining 50% to stevedores only is an unreasonable practice. But it automatically follows that to deny all charge against stevedores because of an imperfect allocation would result either in imposing all 50% against vessel or would deny Cargill a fair monetary return, and if the first allocation (all to stevedore) is an unreasonable practice when the two interests (stevedore and vessel) benefit, then the latter allocation (all to vessel, as recommended by the majority in Footnote 29) must also be an unreason-

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45. Under the Freas Formula costs and charges were distributed initially to vessel and cargo. Generally, expenditures were assigned to the activities in whose furtherance they have been incurred. Contributions of both labor and facilities were measured by the proportionate use made thereof. Proportionate use was determined generally on a time, space, or value basis where possible; otherwise, judgment was used (*Terminal Rate Structure - California Ports, supra,* at 61-62). Judgment was the determinant in arriving at the proportionate uses of the wharf and shipping gallery in the instant case.

reasonably practice.[46] But the basic issue here is not whether stevedores should have been allocated 50% or 40% or 20% or 5% of the aggregate benefits, but rather whether the 5¢ charge is fairly related to the benefits actually received by stevedores. We find the record establishes such fair relationship. Finally, under *Volkswagenwerk*, there need be only a reasonable relationship between benefit and charge - not the strict mathematical and direct relationship between rates and fully allocated costs as required in a domestic rate case and which the majority appears to apply to this case.

With respect to dock cleaning, no one disputes that grain spillage creates a safety hazard which requires periodical cleaning of the grain dock. BARMA's witness recognized that at one time two men spend 8 or 9 hours washing down the dock with hoses. Considering that cleaning can be done only when the dock is empty and keeping in mind that ships often dock at short intervals or even one right following the other and are loaded at any time during the day or at night, it is evident that dock cleaning cannot be done after every vessel. The $50 per vessel charge therefore is no more than a reasonable and fair method of uniformly allocating the cost of dock cleaning, whether or not it is done after every vessel.

It is of more than passing interest to note that BARMA stated on this record there would be no great difference to competing stevedores if the charge in question is assessed provided Rogers does not compete for stevedore business at this facility.[47] This comment is indicative of the fact that

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46. *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966) at 549.

47. Tr. of Oral Argument of March 7, 1973, pages 46-47:
(Footnote continued on next page)

one of Barma's primary purposes is to force Rogers to cease doing business at the facility rather than to eliminate the charge assessed equally against all stevedores.

(Footnote 47 - continued from previous page)

"Commissioner Morse: It seems to me I saw somewhere in the brief, perhaps not in your brief, . . . an allegation to the effect that . . .this type of . . . a shipping elevator, should not be permitted to. . .also conduct stevedoring operations on the premises.

Mr. Bagley [Counsel]: Yes, I think that the elevator has a choice, that it should be made by this Commission to have a choice.

"If it does not compete with stevedores, it will really make no great difference to stevedores, whether or not such a charge is imposed on them.

"In other words, if a reasonable and proper charge should be made by an elevator against some part of the shipping operation and there is no competition between the elevator through its subsidiary or its affiliate with the stevedores working at the elevator and all stevedores are standing in the same position and each one is an independent contracting stevedore, not an affiliate, then the fact that this charge is imposed uniformly across the [board] on each of these stevedores will not in any manner affect their competitive relationship."

The assessment in question was 5¢ per ton at the time the case was heard by the Administrative Law Judge, but will be subsequently raised to 8¢ per ton. BARMA's basic fear is further explained in the following colloquy (Tr. of Oral Argument of March 7, 1973, page 50):

"Mr. Bagley: I think that where you have a tax imposed upon one or two competitors and the tax is imposed by the parent of the one, the house stevedore, you fairly obviously have in the hands of the parent and its subsidiary, the right to control competition between those two.

"I frankly do not recall those figures that were referred to today. But, any time that Cargill wants to put Baton Rouge Marine Con-
(Footnote continued on next page)

Mr. Linnekin's formula for allocating costs and services between cargo, vessel, and stevedores constitutes a fair and equitable method of allocating costs amongst those interests and establishes a reasonable relationship between the charges assessed and the services and benefits provided.

The stevedoring contractor who charges an agreed rate *per ton* loaded into the vessel benefits directly from the increased loading capacity of the Port Allen grain elevator as well as from the high efficiency of its loading equipment, including the shipping gallery and the grain dock-wharf.

There is a reasonable relationship between the charge to stevedores and the benefits received by the stevedore from the services and facilities including dock cleaning and liaison services.

In turn, Cargill is entitled to compensation for these provided services and facilities.

The assessment of the charges against stevedores is necessary in order that Cargill achieve a fair return on the leased facilities.

(Footnote 47 - continued from previous page)

tractors out of business, all it has to do is lower the rates by Rogers to something which will be below Baton Rouge Marine Contractors.

"When it does, this Cargill will have a five cent increment which will be profitable on every ton it loads, which will be compensation received by it over and above its cost load.

"We say that in this is the danger which we do not believe should be allowed by this Commission under an argreement regulated by it."

The record discloses that Cargill has never failed to assess the 5¢ charge against Rogers.

Therefore, we conclude that the charge sought to be assessed against all stevedores operating at the Cargill-leased facility is reasonably related to the economic and commercial benefits derived by the stevedores and the assessment thereof is a just and reasonable practice within the meaning of section 17 of the Act.

The Order. We object to the breadth and scope of that paragraph of the Order which provides:

> It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

In our opinion, and on this record, we have no jurisdiction to issue an order which forbids *any* charge against stevedores until such charge has been found by us to be reasonable. On this record, and for the period of time to which the record speaks, four of five Commissioners have found that respondent provided services and facilities to stevedores and that stevedores received benefits therefrom for which *a* charge could be assessed - only the level of the charge being unresolved by us. Had the above-quoted order been restricted to the 5¢ charge and to the period of time covered in these proceedings, there conceivably might be support, in law, for such order. But it is not so restricted, for on its face it is broad enough to apply to a charge of *less* than 5¢ applicable during the period covered by this record and which charge may be supportable by other cost allocations or modifications of those cost allocations used in this proceeding and

even to a new charge established as of today based on today's costs and benefits and which respondent might now file with us under our General Order 15, 46 CFR 533. In our opinion we may not, even on this record,prohibit either of such new filings for it amounts to an exercise of injunctive power which on this record and in this situation we do not have. *Transpacific Freight Conf. of Japan v. FMB*, 302 F.2d 875 (D.C. Cir., 1962).

Our jurisdiction over tariff filing practices of terminals is based on Section 17, Shipping Act, 1916, and upon our General Order 15, 46 CFR 533. It is inherent in General Order 15 that a terminal tariff rate filing is effective the day the tariff is filed with us unless the filing itself specifies a deferred effective date.[48] As to terminal tariff filings, we do not have suspension authority as we do have in respect to tariff filings by common carriers in our domestic offshore commerce under Section 3, Intercoastal Shipping Act, 1933 (46 U.S.C. 845), nor do we have specific statutory authority to reject a terminal tariff filing as we do have in respect to filings by common carriers by water in our foreign commerce under Section 18(b) (4), Shipping Act, 1916 (46 U.S.C. 817).

Hence, if we have terminal tariff rejection authority, absent a hearing and a finding of a violation of the Shipping Act, 1916, it is only when based on the premise that the filing is so defective in form or substance as to be patently a nullity as a matter of substantive law and that administrative efficiency and justice are furthered by such rejection. *Municipal Light Board etc. v. Federal Power Commission*, 450

48. As originally proposed General Order 15 would have required 30 days' advance filing of terminal tariff rates, rules, and regulations. The 30-day rule was objected to because of lack of authority to prescribe such advance filing and the requirement was dropped. 30 Federal Register 12681 (1965).

F.2d 1341 (D.C. Cir., 1971). We do not have such a nullity before us. See also *Arrow Transportation Co. v. Southern Ry Co.*, 372 U.S. 658 (1963); *United States v. Scrap*, 412 U.S. 669, 697-699 (1973); *Continental Air Lines v. CAB*, __F.2d____(D.C. Cir., 1974); *Rejection of Tariff Filings*, 13 F.M.C. 200 (1970); *Australia/Atlantic and Gulf Conference*, 16 F.M.C. 27, 32 (1972).

The effect of the Order is even more drastic than a suspension order. It purports to give us jurisdiction to approve the level of a rate before the rate may become effective and with no limit on how long our determinations may require. That quoted portion of the Order is illegal and void for want of jurisdiction.

Commissioner George H. Hearn, concurring and dissenting:

I agree that there are no violations of section 16. As to section 17, I concur in the conclusions set forth by Chairman Bentley and Commissioner Day. I disagree with the conclusion with respect to section 15, and find a violation thereof.

It is to some degree true that the lease agreement between Cargill and the Port permits Cargill a broad range of discretion on matters concerning operation of the terminal; but as concluded by the Administrative Law Judge it is not apparent that the agreement permits the type of activity engaged in by Cargill with respect to stevedores. Substantial evidence of the initial intended and approved perimeters of the agreement can be found in the statement of one of the parties. The General Counsel of the Port Commission requested Cargill to at least postpone the imposition of the charges and conditions until approved by the Commission.[49]

49. Initial decision, fn. 10 and accompanying test.

> This insistence on adherence to the terms of an agreement is crucial to the continued existence of the right of persons dealing with conferences and other groups enjoying antitrust exemptions under section 15 to know how they may reasonably expect to be affected by the concerted activity of such groups.[50]

If one of two parties to an agreement cannot find authority in the agreement for the specific activity, it must be presumed that third parties will be in no more advantageous position to construe the agreement.

Clearly, the filing and approval requirements of section 15 cannot be defeated by the contention that the modification of the agreement is unilateral. It has been recently held[51] that the fact of there being parties to an agreement not subject to the Shipping Act does not remove the agreement from section 15 jurisdiction. Were it otherwise parties to an agreement could avoid FMC jurisdiction by the simple device of including a person not subject to the Act.

Similarly, to accept Cargill's argument would allow parties as herein to avoid approval of agreement modifications by formulating them as the acts of only one party.

s/ Francis C. Hurney
Francis C. Hurney
Secretary

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50. *Pacific Coast European Conference - Rules 10 and 12,* 14 F.M.C. 266, 278 (1971). See, also, *Joint Agreement - Far East Conference and Pacific Westbound Conference,* 8 F.M.C. 553, 558 (1965).

51. *NYSA & ILA v. FMC,* F.2d (1974).

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

SERVED
JANUARY 7, 1975
FEDERAL MARITIME COMMISSION

ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference.

***Therefore, it is ordered,* That respondent cease and desist from assessing those charges and imposing those conditions found to be unlawful therein.**

***It is further ordered,* That this proceeding be, and the same hereby is, remanded to the presiding Administrative Law Judge for further proceedings to determine the proper charge, if any, assessable against complainant and those similarly situated for services and facilities provided by respondent which are properly allocable to complainant and those similarly situated.**

***It is further ordered,* That the presiding Administrative Law Judge issue a supplemental decision of his findings in the proceeding on remand.**

It is further ordered, That should it choose to impose certain conditions, respondent immediately file with the Commission a tariff reflecting those conditions, within the guidelines set forth in our Report herein, sought to be imposed.

It is further ordered, That no charge to stevedores for use of respondent's services and facilities based upon allocations of costs found therein to be unreasonable may be imposed by respondent until such charge has been found reasonable on remand and until a tariff reflecting such charge has been filed with the Commission.

By the Commission.

s/ Francis C. Hurney
Francis C. Hurney
Secretary

(SEAL)

Note 10

consolidated proceeding instituted to consider "major issues" of dual rate contracts but which had notice of and opportunity to participate in that proceeding was nevertheless bound by Commission's form of contract, to same extent as other conferences, where Commission was proceeding in area where rule making was not required to be made on record. Pacific Coast European Conference v. U. S., C.A.9, 1965, 350 F.2d 197, certiorari denied 86 S.Ct. 433, 382 U.S. 958, 15 L.Ed. 2d 362.

11. Findings

Finding of Commission that inclusion of Great Lakes trading area under existing dual rate contract system applicable to Atlantic and Gulf ports would be detrimental to commerce, discriminatory vis-a-vis the Lakes and contrary to public interest, was not arbitrary or lacking in substantial support in record. U. S. Atlantic and Gulf/Australia-New Zealand Conference v. Federal Maritime Commission, 1966, 364 F.2d 696, 124 U.S.App. D.C. 303.

12. Judicial review

The court of appeals' function on appeal is to determine whether there is substantial evidence in the record to support conclusion reached by the Maritime Commission, and in so doing the court must recall that the Commission is entitled to draw reasonable inferences from the evidence and must defer to agency expertise where appropriate. Latin America/Pacific Coast S. S. Conference v. Federal Maritime Commission, 1972, 465 F.2d 542, 150 U.S.App.D.C. 362, certiorari denied 93 S.Ct. 269, 409 U.S. 967, 34 L.Ed. 2d 234.

Court of appeals was required to respect judgment of Federal Maritime Commission grounded in administrative expertise. American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission, 1967, 380 F.2d 609, 127 U.S.App.D.C. 62.

Action of Federal Maritime Commission in promulgating rule interpreting this section was not subject to judicial review, where legal effect of rule was only essentially that of opinion of Commission's legal staff, and rule had no independent binding effect on carriers. American President Lines, Limited v. Federal Maritime Commission, 1963, 316 F.2d 419, 114 U.S.App.D.C. 418.

§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc., by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be subject to a civil penalty of not more than $1,000

for each day such violation continues: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were entered into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Sept. 7, 1916, c. 451, § 15, 39 Stat. 733; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 305, 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; Oct. 3, 1961, Pub.L. 87-346, § 2, 75 Stat. 763; Feb. 29, 1964, Pub.L. 88-275, 78 Stat. 148; Aug. 29, 1972, Pub.L. 92-416, § 1(a), 86 Stat. 653.

Historical Note

References in Text. Sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto, referred to in text, as originally enacted read: "Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto."

Act July 2, 1890, Sherman Anti-Trust Act, and sections 73 to 76 of the Act of Aug. 27, 1894, Wilson Tariff Act, constitute sections 1 to 11 of Title 15, Commerce and Trade. Section 77 of said Act of 1894 was superseded by section 4 of the Clayton Act of Oct. 15, 1914, section 15 of said Title 15.

"Date of enactment of this Act" and "enactment of this Act", referred to in text, probably means Feb. 29, 1964, the date of approval of Pub.L. 88-275 amending this section.

1972 Amendment. Pub.L. 92-416 substituted a civil penalty of not more than $1,000 for each day of violation for a penalty of not more than $1,000 for each day of violation, and struck out provisions relating to the recovery by the United States in a civil action, in the last paragraph relating to penalties.

1964 Amendment. Pub.L. 88-275 provided for exemption of certain terminal leases from penalties.

1961 Amendment. Pub.L. 87-346 amended section generally and, among other changes, substituted "Commission" for "Federal Maritime Board" and included provisions referring to sections 813a and 817(b) of this title.

Repeals. For provisional repeal, see note set out preceding section 801 of this title.

Transfer of Functions. "Federal Maritime Commission" and "Commission" were substituted for "Federal Maritime Board" and "Board" in view of sections 101 and 304 of 1961 Reorg.Plan No. 7, which established the Federal Maritime Commission and abolished the Federal Maritime Board, including the offices of the members thereof, and transfer of all functions under this section vested in the Federal Maritime Board under the provisions of 1950 Reorg.Plan No. 21, set out as a note under section 1111 of this title, to the Federal Maritime Commission by section 103(a) of 1961 Reorg.Plan No. 7, set out as a note under section 1111 of this title. Section 104 of 1961 Reorg.Plan No. 7 transferred to the Chairman of the Federal Maritime Commission the functions